TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 436.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED JULY 28, 1921.

(28,301)

(28,391)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1921.

a United States District Court, District of New Jersey.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railroad Company, The Norfolk & Western Railroad Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester and Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, The Long Island Railroad Company, Boston & Albany Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Central Vermont Railway, Petitioners-Appellants,

against

UNITED STATES OF AMERICA, Respondent-Appellee, and INTERSTATE COMMERCE COMMISSION, Intervening Respondent-Appellee.

Docket Entries.

June	27,	1921.	Petition for Injunction filed.
"	29,	"	Appearance of Interstate Commerce Commission filed.
July	2,	"	Answer of Interstate Commerce Commission, filed.
"	"	"	Motion of the U. S. to Dismiss petition, filed.
"	"	"	Hearing on motion for Injunction.
"	"	"	Hearing on motion to dismiss Petition.
"	"	"	Order denying motion for Injunction and denying motion to dismiss, filed.
"	"	"	Petition and Order allowing Appeal, filed. (Appeal allowed in open Court.)
"	"	"	Affidavit of Service of Petition, filed.
"	"	"	Assignment of Errors, filed.
"	7,	"	Bond on Application for stay, filed.
"	"	"	Notice of Motion for Injunction, filed.

b

July	12,	1921.	Præcipe for Appeal Record, filed.
"	"	"	Bond on Appeal, filed.

1 In the District Court of the United States for the District of New Jersey, June Term, 1921.

In Equity.

No. —.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railroad Company, Norfolk & Western Railway Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company, The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

Petition.

Filed June 27, 1921.

To the Honorable the Judges of said Court:

The Central Railroad Company of New Jersey, a corporation of the State of New Jersey; The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania; The Baltimore & Ohio Railroad Company, a corporation of the State of Maryland;

2 the Chesapeakee & Ohio Railway Company, a corporation of the State of Virginia; Norfolk & Western Railway Company, a corporation of the State of Virginia; The Richmond, Fredericksburg & Potomac Railroad Company, a corporation of the State of Virginia; Washington Southern Railway Company, a corporation of the State of Virginia; Western Maryland Railway Company, a corporation of the State of Maryland and of the State of Pennsylvania; Erie Railroad Company, a corporation of the State of New York; The Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania; Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania; Buffalo, Rochester & Pittsburgh Railway Company, a corporation of the States of New York and Pennsylvania; The New York Central Rail-

road Company, a corporation of the State of New York and other states; Philadelphia & Reading Railway Company, a corporation of the State of Pennsylvania; The New York, New Haven & Hartford Railroad Company, a corporation of the State of Connecticut and other states; James H. Hustis, as temporary receiver of the Boston & Maine Railroad Company, and said Company, a corporation of the State of Maine and of other states; Maine Central Railroad Company, a corporation of the State of Maine; The Delaware & Hudson Company, a corporation of the State of Pennsylvania; Boston & Albany Railroad Company, a corporation of the State of Massachusetts; The Long Island Railroad Company, a corporation of the State of New York; Central Vermont Railway Company, a corporation of the State of Vermont; Rutland Railroad Company, a corporation of the State of Vermont, and Buffalo & Susquehanna Railroad Corporation, a corporation of the State of Pennsylvania,
3 bring this their petition on behalf of themselves and of such other companies as have an interest in and may by proper proceedings become parties hereto, against the United States of America.

And thereupon your petitioners complain and say:

I.

That your petitioners are corporations duly organized and existing under and by virtue of the laws of the several states and reside as recited above, and are common carriers by railroad, engaged in interstate commerce. In respect of such interstate transportation of passengers and property each of your petitioners is subject to the Act of Congress entitled "An Act to Regulate Commerce" passed by Congress and approved February 4, 1887, and acts amendatory thereof and supplementary thereto, insofar as the same are constitutional.

II.

That the American Creosoting Company is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, engaged in the business of creosoting lumber, piling, telegraph cross-arms, railroad ties and wooden paving blocks, and having its residence in the City of Newark, County of Essex and State of New Jersey, within the limits of the District of New Jersey.

III.

That on or about the 18th day of April, A. D., 1919, the said American Creosoting Company filed a certain petition before the Interstate Commerce Commission against the petitioners and also the Director General of Railroads, the same being docketed
4 on the docket of the said Commission as Docket No. 10,582, a copy of which petition is annexed hereto marked "Exhibit A" and made a part hereof.

IV.

That a transit privilege as the term is used in interstate commerce is a privilege granted by railroads under which a commodity is first transported from point of origin to a milling or manufacturing point where a commercial process is performed on it and the resulting product is then transported from the milling or manufacturing point to final destination at the through rate applicable on shipments from the original point of origin to the final destination. At certain points in the South and West, certain railroads, which were not defendants in the proceeding before the Interstate Commerce Commission, have, by their individual tariffs, granted such a transit privilege for the creosoting of lumber and lumber products. None of the petitioners at any points on their line, however, allow the privilege of creosoting-in-transit. The only connection between your petitioners herein and the carriers which have granted such privileges at points on their line consists in the fact that they have entered into through routes and joint rates with such carriers. By said petition filed with the Interstate Commerce Commission the said American Creosoting Company sought to obtain an order from the Interstate Commerce Commission requiring the petitioners herein, instead of collecting their lawfully established rates applicable on shipments of creosoted lumber, piling, cross-arms, railroad ties and paving blocks creosoted at Newark and transported therefrom to points in the States of New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine, Vermont, Pennsylvania, Maryland, Virginia and West Virginia, to indulge in the fiction that said shipments were not local shipments from said Newark, but were a continuation of through shipments from points in the States of South Carolina, Georgia, Florida, Alabama, Louisiana and Mississippi, by establishing a so-called creosoting-in-transit privilege at Newark in connection with the joint through rates participated in by your petitioners herein and applicable from points in the States of South Carolina, Georgia, Florida, Alabama, Louisiana and Mississippi, to points in the States of New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine, Vermont, Pennsylvania, Maryland, Virginia and West Virginia and West Virginia.

V.

That to the said petition, Walker D. Hines, Director General of Railroads, acting for himself and for the petitioners herein, filed an answer with the Interstate Commerce Commission, which is attached hereto marked "Exhibit B" and made a part hereof, denying any obligations, individually or jointly, on his or their part under the Interstate Commerce Act, or any other law, to furnish said privileges of creosoting-in-transit in connection with the said joint rates, but averring full performance by the Director General of Railroads and each of said petitioners herein, of all of their lawful duties in connection with the handling of said shipments from Newark.

VI.

That thereafter; to-wit, on or about the 26th day of June, A. D., 1919, hearing was held before the Interstate Commerce Commission at New York, New York, at which hearing testimony was taken on behalf of the American Creosoting Company and on behalf
6 of the Director General of Railroads and the petitioners herein.

VII.

That thereafter; to-wit, on or about the 2d day of March, A. D., 1920, briefs having been filed by the parties to the proceedings, a tentative report by Walter N. Brown, the Examiner of the Commission who had heard the evidence, was served on the petitioners herein and on the American Creosoting Company, by the Interstate Commerce Commission, in which report the Examiner recommended as follows:

"The Commission should find that defendants insofar as they participated in through rates on creosoted lumber, piling, telegraph cross-arms, railroad ties, and wood paving blocks, from points in southern classification territory, applying through Newark to points in northern New Jersey, eastern New York and in New England, on the basis of which through rates, plus a transit charge, creosoting-in-transit is permitted at Madison, Indianapolis, Bloomington, Toledo, or Simpson, while a like transit arrangement is contemporaneously denied at Newark, subject complainant to undue prejudice and disadvantage."

VIII.

That thereafter; to-wit, on or about the 18th day of March, A. D., 1920, in accordance with said Commission's Rules of Practice, the petitioners herein filed with the Interstate Commerce Commission, exceptions to said tentative report, in which it was urged that,
7 as a matter of law, the Commission lacked power to hold that the Central Railroad Company of New Jersey and the Pennsylvania Railroad Company were chargeable with subjecting complainant to undue prejudice at said Newark in violation of Section 3 of the Commerce Act merely because of the action of certain other carriers at points in the South and West.

IX.

Thereafter; to-wit, on or about the 7th day of May, A. D., 1920, the issue raised by your petitioners' exceptions to said tentative report, as well as all other issues in the case, were orally argued before Commissioners Clark, Daniels and Woolley, members of the Interstate Commerce Commission, and the absence of legal warrant for the finding recommended by said Examiner of the Commission was again urged.

X.

Thereafter, the Interstate Commerce Commission made its report and entered its order in said proceeding, a copy of which report and order is attached hereto marked "Exhibit C" and made a part hereof. Said report and order, although dated March 15, 1921, was not served on your petitioners herein until on or about April 15, 1921. It adopted the above quoted recommendation of said Examiner notwithstanding your petitioners' exceptions thereto and concluded as follows:

"Following Southern Hardwood Traffic Association v. Director General, 61 I. C. C. 132, and upon the facts of record in this case, we find that the refusal of the Central and Pennsylvania to establish creosoting-in-transit arrangements at Newark is not unrea-
8 sonable, but that defendants, insofar as they respectively participate in tariffs carrying joint rates on lumber, piling, telegraph cross-arms, railroad ties and wooden paving blocks, applying through Newark from points in southern *calssification* territory to points in northern New Jersey, eastern New York and in New England, and permitting in connection with such joint rates creosoting-in-transit at Madison, Indianapolis, Bloomington, Toledo, or Simpson, while contemporaneously denying similar transit arrangements at Newark, subject complainant to undue prejudice and disadvantage.

"An appropriate order will be entered requiring the removal of the undue prejudice."

Appended to said report is the following dissenting opinion of Commissioner Hall:

"This case is similar in principle to Southern Hardwood Traffic Asso. v. Director General, 61 I. C. C. 132, and most of what is said in my dissenting expression there is applicable here.

"In central territory the carriers accord the transit; in trunk line territory they do not. The Pennsylvania Railroad and Central of New Jersey, which serve Newark, do not accord the transit at any point on their lines. Nevertheless, because they participate in joint rates with carriers which permit transit in central territory,
9 they must, under the majority report, allow the transit at Newark or cancel their participation in the joint rates, although the circumstances and conditions at Newark affecting the desired transit are plainly different from those at points in central territory where transit is allowed, and although cancellation of the joint rate will not help Newark."

There is also attached hereto marked "Exhibit D" a copy of said Commission's report and order in Southern Hardwoood Traffic Association v. Director General, et al., 61 I. C. C. 132, in which the Commission more fully explains the theory on which its findings of undue prejudice in both these cases is based.

XI.

The order (Exhibit C annexed hereto) entered by the Commission and served upon your petitioners, reads as follows:

"This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"And it appearing, That the Commission has found in said report that the above named defendants, in so far as they respec-
10 tively participate in tariffs carrying joint rates applying through Newark, N. J., on lumber, piling, telegraph cross-arms, railroad ties, and wooden paving blocks from points in southern classification territory to points in northern New Jersey, eastern New York and in New England, and permitting in connection with such joint rates creosoting in transit at Madison, Ill., Indianapolis, Ind., Bloomington, Ind., Toledo, Ohio, or Simpson, Miss., while contemporaneously denying similar transit arrangements at Newark, N. J., on the same through rates, subject complainant to undue prejudice.

"It is ordered, That the above named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1921, and thereafter abstain, from the undue prejudice in said report to exist.

"It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 20, 1921, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 7 of the inter-
state commerce act, and thereafter to maintain and apply
11 rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

"And it is further ordered, That this order shall continue in force until the further order of the Commission."

XII.

That thereafter; to-wit, on or about the 18th day of June, A. D., 1921, the Commission entered an amendment to said order, copy of which is attached hereto marked "Exhibit E" and made a part hereof.

XIII.

As the report of the Commission (Exhibit C attached hereto) shows, (1) the plant of the American Creosoting Company in Newark, New Jersey, is reached only by the Pennsylvania Railroad and the Central Railroad of New Jersey, both petitioners herein and by

water carriers; (2) neither said Pennsylvania Railroad Company nor said Central Railroad Company of New Jersey accords the privilege of creosoting-in-transit at any points on their lines; (3) no competitors of the American Creosoting Company are located upon the rails of said Pennsylvania Railroad Company or said Central Railroad Company of New Jersey; (4) there is no point on any railroad in trunk line territory in which the creosoting-in-transit privilege is allowed by any railroad, except at Broadford Junction in the State of Pennsylvania, which is near the dividing line between trunk line territory and Central Freight Association territory and as to many rates is treated as a Central Freight Association point, and this privilege at Broadford Junction is allowed only by the Pittsburgh & Lake Erie Railroad Company, which was not one of the
12 defendants in said proceeding before the Interstate Commerce Commission; (5) the points in comparison with which the Commission by its report found that the plant of the American Creosoting Company at Newark was unduly prejudiced, are in Simpson, Mississippi, Madison, Illinois, Indianapolis and Bloomington, Indiana, and Toledo, Ohio, located on lines of railroads, none of which were parties to said proceeding before the Interstate Commerce Commission. Upon these facts the petitioners herein are advised by counsel and therefore aver that they are in no way responsible for the granting of the creosoting-in-transit privilege at said Simpson, Madison, Indianapolis, Bloomington or Toledo, or at any other point or points.

XIV.

That, while it is true that the petitioners in this suit are, as stated in the opinion of the Commission, parties to joint through rates under which other railroads, also parties to such rates, have established a privilege of creosoting-in-transit at points local to their lines of railroad, the petitioners, as already stated, have not established such privilege on their lines of railroad, nor have they participated in or been consulted with respect to, the establishment of the privilege of creosoting-in-transit on the lines of the other carriers parties to the said joint rates. Under the Act to Regulate Commerce as amended, as your petitioners are advised by counsel, and under the rules of the Commission governing the publishing, posting and filing of tariffs, local privileges such as and including creosoting-in-transit are permitted to be established by any carrier party to a joint through rate at any point on its line, without con-
13 sultation with or securing the concurrance of any other carrier party to such joint through rate; and the privileges so established and referred to in this case were established without the concurrance or participation of any of your petitioners. Your petitioners are advised by counsel, and therefore aver that their participation in joint rates, under these circumstances does not constitute participation in the local privileges such as and including creosoting-in-transit which may be established by other carrier parties to the said joint rates without the concurrance or consent of your petitioners.

XV.

That your petitioners are advised by counsel and therefore aver that the matters complained of in the petition filed with the Interstate Commerce Commission by the American Creosoting Company and set forth in the opinion of the said Interstate Commerce Commission disclose no violation of the Act to Regulate Commerce.

XVI.

Your petitioners are further advised by counsel and therefore aver that neither the Act of Congress entitled "An Act to Regulate Commerce" as amended, nor any other law confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition.

XVII.

Your petitioners are further advised by counsel and therefore aver that said order of the Interstate Commerce Commission is without lawful warrant and deprives your petitioners of their property without due process of law, and is in violation of the Fifth Amendment of the Constitution of the United States.

14

XVIII.

Your petitioners can only comply with said unlawful order by either cancelling their concurrence in said joint rates on lumber and said lumber products or by granting the creosoting-in-transit privilege at Newark. For your petitioners to withdraw their concurrences from the existing joint rates would tend to divert traffic to other routes and to deprive them of revenue to which they are justly entitled. In addition it would in all probability prove an illusory remedy in view of the power and duty of the Commission to establish joint rates when deemed necessary or desirable in the public interest. For your petitioners to grant the creosoting-in-transit privilege at Newark would, on all lumber creosoted at Newark, deprive them of the difference between the sum of their local rates applying to and from Newark and said joint rates and would impose substantial expense for policing, etc., and would in view of the great difficulty of enforcing the transit tariffs, subject your petitioners to the risk of substantial penalties.

By reason of the premises said order of the Interstate Commerce Commission so entered will, unless restrained by this Honorable Court, produce irreparable damage to your petitioners, not only by its effect on the petitioners' revenues and expenses on lumber products transported to and from said Newark, but by establishing a principle which would disarrange and disturb the whole rate structure of your petitioners throughout trunk line territory to their great prejudice and financial loss.

XIX.

Your petitioners further aver that if they should comply
15 with said unlawful order, even temporarily, pending final adjudication of the lawfulness thereof, said petitioners will be without any means of reparation for the substantial losses in revenue thereby sustained.

XX.

In consideration whereof, since your petitioners are remediless in the premises at or by the strict rule of the common law and are only relievable in a Court of Equity, where matters of this kind are properly cognizable and reviewable under the act heretofore mentioned, your petitioners pray that due service of this petition be made on the respondent herein and that a preliminary or interlocutory order or injunction be entered out of and under the seal of this Honorable Court, restraining and enjoining the respondent and the Interstate Commerce Commission and its agents and representatives from enforcing said order of the Interstate Commerce Commission of March 15, 1921, as amended on June 18, 1921, and from taking any steps or instituting any proceedings for the enforcement thereof, until the final determination of this cause and that upon the final hearing of this suit, a decree be entered herein, enjoining, setting aside, annulling, and suspending the said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order.

Your petitioners further pray that your Honors direct that due and proper notice of this Bill for an Injunction be served forthwith on the respondent herein, on the Attorney General of the United States, and on the Interstate Commerce Commission.

Your petitioners further pray that your Honors may grant
16 unto said petitioners a writ of subpœna directed to the said respondent, the United States of America, commanding it at a certain day therein to be specified to appear before this Honorable Court and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived) and to perform and abide by such order and decree herein, as your Honors shall deem mete and agreeable to equity and good conscience.

And your petitioners will ever pray &c.

CHARLES E. MILLER,
Solicitor for Petitioners.

Room 33 C. R. R. of N. J. Terminal Station, Jersey City, N. J.

ALEXANDER H. ELDER,
HENRY WOLF BIKLE,
Of Counsel.

17 STATE OF NEW YORK,
County of New York, ss:

Robert N. Collyer, an Agent of the Petitioners, employed as Chairman of the Trunk Line Association, of which your petitioners are members, being duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ROBERT N. COLLYER.

Sworn to before me this 25 day of June 1921.

[SEAL.] E. LEWIS JOHNSON,
Notary Public, Kings Co. No. 24.

143 Liberty St., N. Y. City.
Certificate filed New York Co. No. 54.
My Commission Expires Mar. 30, 1922.

18 EXHIBIT "A."

Filed April 18, 1919.

Before Interstate Commerce Commission.

Docket Number 10582.

AMERICAN CREOSOTING COMPANY

vs.

WALKER D. HINES, Director General of Railroads, and THE Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Western Maryland Railway Company, Erie Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver, Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company (The New York Central Railroad Company, Lessee), The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, Buffalo & Susquehanna Railroad Corporation, New York, Ontario & Western Railway Company, Defendants.

Your petitioner herein complains of the above named defendants and for cause of action alleges:

I.

That said American Creosoting Company is a corporation duly organized, existing under and by virtue of the laws of the State of New Jersey, with its principal office at 17 Battery Place, in the City of New York, in the State of New York.

19 II.

That your said petitioner at their plant located at Newark, N. J., having switch track connection with the Central Railroad of New Jersey and the Pennsylvania Railroad is engaged in Creosoting Lumber, Piling, Telegraph Cross Arms, Railroad Ties, and Wooden Paving Blocks and the market- therefor are points of consumption in what is known as Official Classification Territory as more particularly set out hereinafter.

III.

That on August 29th, 1916, the President of the United States approved an Act of Congress entitled "An Act Making Appropriations for the Army for the Fiscal *Yearing* Ending July 30th, 1917, and for Other Purposes," and thereupon and thereunder issued his proclamation of date of December 6th, 1917, taking over and placing under Federal Control certain and various railroads and systems of railroads in the United States, including those named as defendants herein and appointed one W. G. McAdoo as Director General of Railroads to act for him and in his name and stead in the management, control and operation of said railroads and railroad systems; that thereafter the said W. G. McAdoo resigned his said position as Director General of Railroads, whereupon, to wit: on the 11th day of January, 1919, the President of the United States appointed Walker D. Hines, defendant herein, to be Director General of Railroads to act in the name and stead of the President of the United States in the management, control and operation of said railroads and railroad systems; that as such Director General of Railroads, and as such representative of the President of the United States, the
20 said defendant Walker D. Hines, is subject to the provisions of an Act of Congress, approved March 21st, 1918, entitled "An Act To Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of Their Owners and for Other Purposes." That the above Railroads Companies, defendants herein, whether under Federal Control or otherwise w*h*ere at all times mentioned in this complaint and now are common carriers, engaged in the transportation of the commerce of the United States between points in different states of the said United States and particularly in the transportation of Lumber, Piling, Railroad Ties, Telegraph Cross Arms and Wooden Paving Blocks as herein set out and as such common carriers subject to the provisions of the Act to Regulate Commerce approved February 4th, 1887, and the acts amendatory thereto and supplementary thereto. That acting under and by virtue of said Act of Congress, approved March 21st, 1918, entitled "An Act to Provide for the Operation of Trans-

portation Systems While under Federal Control for the Just Compensation of Their Owners and for Other Purposes," the said W. G. McAdoo, then Director General of Railroads on *May* 25th, 1918, issued and promulgated an order known as General Order 28, effective June 25th, by the terms of which there were established from Newark, N. J., certain rates for the transportation of Creosoted Lumber, Piling, Railroad Ties, Telegraph Cross Arms, and Wooden Paving Blocks upon all railroads defendants herein, which said rates were advances based upon rates heretofore in force and effect and which said advanced rates are now in effect.

21 IV.

That in conducting their business of Creosoting articles herein mentioned and in the sale and shipment in carloads of same, the principal points of consumption in Official Classification Territory include such cities as Richmond, Va., Philadelphia, Pa., Easton, Pa., Pittsburgh, Pa., Buffalo, N. Y., Rochester, N. Y. Syracuse, N. Y., Albany, N. Y., Jersey City, N. J., New York, N. Y., New Haven, Conn., Providence, R. I., Boston, Mass., Worcester, Mass., Springfield, Mass., Concord, N. H., Portsmouth, N. H., and Portland Me., and to these points they pay the local carload rates applicable from Newark, N. J., as published by Pennsylvania Railroad and Central Railroad of New Jersey.

V.

That your petitioner secures their lumber, Wood Paving Blocks, Piling, Railroad Ties and Telegraph Cross Arms in carloads which they Creosote at Newark, N. J., from points in Southern Classification Territory including those located in the States of South Carolina, Georgia, Florida, Alabama, Louisiana, and Mississippi and more particularly from Jacksonville, Fla., Century, Fla., St. Marys, Ga., Bogalusa, La., Lockhart, Ala., and Hattiesburg, Miss. and pay thereon rates to Newark as published in H. J. Glenn's I. C. C. A-43, Southern Railway I. C. C. A-5360, Seaboard Air Line I. C. C. 1617, Atlantic Coast Line I. C. C. A-2152, Mobile & Ohio Railroad I. C. C. A-1261, New Orleans Great Northern Railroad I. C. C. 230, Louisville & Nashville Railroad I. C. C. A-13163, Illinois Central Railroad I. C. C. 4418 and New Orleans Northeastern Railroad I. C. C. 2639
22 and tariffs published by other Southern Lines as on file with the Commission.

VI.

That the competitors of your petitioner engaged in Creosoting articles set out herein are located among other points at Simpson, Miss., Madison, Ill., Indianapolis, Ind., Toledo, Ohio, Bloomington, Ind., and Broadford Junction, Pa., and that by virtue of the following tariffs among others, the competitors of your petitioner are accorded Transit Privileges permitting the stoppage of Lumber, Piling, Telegraph Cross Arms, Railroad Ties, and Wooden Paving Blocks at the various Creosoting points and the reshipment of the Creosoted

Lumber from the various points herein stated to the various destinations herein stated in Official Classification Territory at the Through rates from original points of shipment of the Lumber, Piling, Telegraph Cross Arms, Railroad Ties, and Wooden Paving Blocks in Southern Classification Ter-itory to final destinations as published by Southern Classification carriers where through rates apply through the Creosoting point; at Simpson, Miss., Illinois Central Railroad, I. C. C. 4618; Madison, Ill., Toledo, St. Louis & Western Railroad I. C. C. A-714, Illinois Central Railroad I. C. C. A-9201, Wabash Railroad I. C. C. 4017; at Indianapolis, Cleveland, Cincinnati, Chicago and St. Louis Railroad I. C. C. 6985 and Illinois Central Railroad I. C. C. A-9004; at Bloomington, Ind., Cincinnati, Indianapolis and Louisville Railroad I. C. C. 3399; at Toledo, Wabash Railroad I. C. C. 4017, Toledo, St. Louis and Western Railroad I. C. C. A-714, Michigan Central Railroad I. C. C. 4808, New York Central Railroad I. C. C. LS-496; at Broadford Junction, Pa., Pittsburgh,
23 and Lake Erie Railroad I. C. C. 2119.

VII.

That the defendants are parties to these various stoppage-in-transit arrangements through the fact that they are parties to the through rates as published by the originating carriers.

VIII.

That from the shipping points set forth herein and from other shipping points in the South of Lumber, Wooden Paving Blocks, Piling, Railroad Ties and Telegraph Cross Arms, there are through rates in effect to some points set out herein, and other points in the Official Classification Territory, to which your petitioner ships the Creosoted Articles that apply through Newark, as shown by the tariffs published by the originating lines on file with the Commission and to which the defendants are a party, and that the defendant carriers deny your petitioner the use of said through rates by refusing to establish a stoppage in transit privilege at Newark.

IX.

That by denying this stoppage in transit privilege to your petitioner and compelling them to pay the carload rates from the originating point of the lumber shipments to Newark then the carload rates from Newark on the Creosoted articles to final destinations, the above named defendant- have been charging rates that are excessive, unjust, unreasonable and discriminatory and preferential and prejudicial and in violation of Section 1, 2, and 3 of the said Act to Regulate Commerce and of Section 10 of the said Act of March 21, 1918.

24 X.

That there are numerous points of consumption for the creosoted lumber in Official Classification Territory to which the through carload rates from points in Southern Classification Territory as pub-

lished by the Southern Classification Lines do not apply through Newark and to such points of consumption the prevailing rates from Newark as charges by the above-named defendants are unjust and unreasonable in violation of Section 1 of the Act to Regulate Commerce and unjustly discriminatory in violation of Section 2 and unduly preferential and prejudicial in violation of Section 3 thereof and contrary to Section 10 of the said Act of March 21, 1918.

XI.

That reasonable and just carload rates would be the through rates from the point of shipment of lumber to the final destination of Creosoted Lumbeer, with stop-off at Newark, N. J., for creosoting where the through rates apply through Newark, N. J., and wherein a back haul is involved or to such points where the through rate does not apply through Newark, N. J., the following schedule of carload rates would be reasonable:

Distances.	Rates in cents per cwt.
30 miles and under	$21\frac{1}{2}$
60 miles and over 30 miles	$31\frac{1}{2}$
100 miles and over 60 miles	5
150 miles and over 100 miles	6
200 miles and over 150 miles	7
300 miles and over 200 miles	$81\frac{1}{2}$
400 miles and over 300 miles	$91\frac{1}{2}$
500 miles and over 400 miles	10

25 Wherefore our petitioner prays that the said defendants be required severally to answer the charges herein made; that after due hearing and investigation an order be made commanding said defendants, each of them, to cease and desist from the aforesaid violations of the said Act to Regulate Commerce and of said Act of March 21, 1918, and to establish and put in force and effect and to apply in the future just and reasonable carload rates for the transportation of Creosoted Lumber, Railroad Ties, Telegraph Cross-Arms, Wooden Paving Blocks and Piles herein made the basis of this action throughout the territory in which complain-t markets their product and for such further or other orders as to the Commission may appear just, reasonable and necessary, the premises considered.

Respectfully submitted,

AMERICAN CREOSOTING COMPANY,
Complain't.

By J. L. ROBERTS.

Dated at New York, N. Y., this 16th day of April, 1919.

J. L. ROBERTS,
for Petitioner.

Room 1426, 17 Battery Place, New York City, New York.

26 EXHIBIT B.

Before the Interstate Commerce Commission.

I. C. C. Docket, No. 10582.

AMERICAN CREOSOTING COMPANY, Petitioner,

vs.

WALKER D. HINES, Director General of Railroads, et al., Respondents.

The Answer of Walker D. Hines, Director General of Railroads, Answering for Himself and on Behalf of All the Defendants under Federal Control, to the Complaint.

For answer to the complaint, or so much thereof as he is advised is necessary for him to answer, this defendant says:

1. He admits that he is Director General of Railroads, and as such is exercising the powers vested in and duties assigned him.

2. He refers to the tariffs named in the complaint, and to all other tariffs applicable, for a correct statement of the rates referred to or complained of herein.

3. He denies that he or any of the defendants under Federal control has violated or is violating Section 1, 2 or 3 of the Act to Regulate Commerce, or Section 10 of the Federal Control Act, as alleged in the complaint, or that anything done or omitted by him or any of them, with respect to the subject matter of the said complaint is in violation of law, or that he or any of them should be subjected to any adverse order; and he denies that the complainant is entitled to the relief prayed, or any other relief.

27 And having fully answered, he prays that the complaint may be dismissed.

WALKER D. HINES,
Director General of Railroads,
By R. V. FLETCHER,
Assistant General Counsel,
United States Railroad Administration.

Washington, D. C., May 16 1919.

EXHIBIT C.

Law Department, C. R. R. of N. J., July 5, 1921.

Interstate Commerce Commission.

6774.

No. 10582.

AMERICAN CREOSOTING COMPANY

v.

DIRECTOR GENERAL, CENTRAL RAILROAD COMPANY OF NEW JERSEY, et al.

Submitted May 7, 1920. Decided March 15, 1921.

1. Defendants' participation in tariffs carrying joint rates on lumber and permitting under such rates creosoting in transit at certain points, while contemporaneously denying similar transit upon the same through routes at Newark, N. J., found to subject complainant to undue prejudice and disadvantage with respect to traffic from points in southern classification territory to points beyond Newark.
2. Refusal of the defendants serving Newark to establish creosoting-in-transit arrangements at that point found not unreasonable.

J. L. Roberts for complainant.
A. H. Elder and H. B. Thomas for defendants.

Report of the Commission.

DANIELS, *Commissioner:*

The issues here presented were made the subject of a proposed report by the examiner; exceptions were filed by defendants; and the parties have been heard in oral argument.

Complainant is a corporation engaged in shipping carloads of lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to its plant at Newark, N. J., where they are creosoted and reshipped to points of consumption in official classification territory. For the movement of this material complainant pays the rates to and from Newark, whereas its competitors in central territory and in the south have transit arrangements under which they can ship to the same points of consumption at the joint rates plus a transit charge. By its complaint filed March 24, 1919, as amended, complainant alleged that the denial to it of similar transit arrangements, which include the cutting of paving blocks into shape at the creosoting plant, re-

sulted in charges which were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, and 3 of the act to regulate commerce and of section 10 of the federal control act. It is contended that just and reasonable carload rates would be the joint rates from the points of origin to the final destinations of the creosoted articles where the joint rates apply via Newark, and that where the joint rates do not apply through Newark the said joint rates plus charges ranging from 2.5 cents for 30 miles and under to 30 cents for 500 miles for out-of-line or backhaul movements would be just and reasonable. No objection is made to an additional transit charge similar to that charged its competitors. We are asked to prescribe just and reasonable rates for the future. Rates are stated herein in cents per 100 pounds and do not include the increases authorized in Increased Rates, 1920, 58 I. C. C., 220.

The process of creosoting consists of steaming the wood in a retort or cylinder, removing the moisture, and running in the creosoting oil, a coal-tar product, under pressure for a number of hours, then removing the excess oil and putting the wood in a vacuum to clean it. Wood so treated is used quite extensively throughout the country, especially in the east, for railroad ties and telegraph cross arms, for paving streets, sidewalks, and factory floors, and in the construction of docks. The wood used for creosoting is largely long-leaf yellow pine originating in the south. While some other woods, such as spruce, originating in other sections of the country, will absorb the creosote, they curl and twist, and are therefore unsuitable for the purposes for which creosoted wood is principally used.

Complainant's plant is reached by the Pennsylvania Railroad and the Central Railroad of New Jersey, hereinafter referred to as the Pennsylvania and the Central. Newark is on the main line of the New York division of the Pennsylvania. Trains containing cars for complainant arriving at Newark over the Pennsylvania are broken up at Waverly, a large classification yard of the Pennsylvania in Newark, and the cars for complainant are then moved over the Passaic and Lister branches and over a track operated jointly by the Pennsylvania and the Central and known as the Manufacturers Extension Railroad to complainant's plant, approximately 5 miles from Waverly. Newark is not on the Central's main line to New York, but is on what are known as the Newark-Elizabeth and Newark-New York branches. The Central's trains containing cars for Newark leave the main line at Elizabethport, N. J., and move for 8 miles over the Newark-Elizabeth branch to Brills Junction, in Newark, where the cars are classified. They are then switched over the Manufacturers Extension branch to complainant's plant. Traffic for New York may move via the Central through Newark, the routing being unrestricted. As an operating matter it is not ordinarily handled through that point, but moves direct over the main line through Bayonne, N. J., to Jersey City, N. J. Traffic from the south and west does not move via the Central through Newark or Jersey City when destined to points on the New York, New Haven & Hartford Railroad, but is delivered to the Lehigh & Hudson River Railroad at

Easton, Pa., for movement beyond in connection with the New York, New Haven & Hartford. This is due to the fact the latter carrier refuses to accept this traffic from the Central at Jersey City, although the Central naturally prefers the latter route because of the longer haul which it would receive. Traffic from the south and from St. Louis, Mo., and other Mississippi River crossings, when routed by way of the Pennsylvania to points in eastern New York and in New England, moves through Newark.

Complainant creosotes all of the lumber material which it receives. Much of this material has in the past reached Newark by water, in 1914 about 40 per cent being received in this way, of which approximately 75 per cent consisted of railroad ties. At the time of the hearing less freight was being received by water on account of the increase in ocean freight charges, although it is stated that ocean freight charges are lower than they were in 1917 and 1918. Complainant's plant is on the Passaic River and has ample dock facilities and a large steel lifting crane. As the depth of the water at the dock is only 4 feet at high tide, freight must be barged to the dock, a service which adds to the cost of transportation. An initial rail haul is also usually involved.

Complainant purchases railroad ties at points in Florida, such as Jacksonville, Fernandina, and Tampa; also at Mobile, Ala., and other southern points. Complainant's competitors are said to secure their ties from the same general territory, but complainant's witness was unable to name specific points. Most of the ties creosoted by complainant are the property of the railroads. As to the latter traffic complainant is not interested in the freight rate and frequently does not know where the ties originate. Paving stock is usually about 4 inches wide, 3 inches thick, and 5 to 10 inches long. It is cut largely from the waste of big timbers and is supplied principally by the larger mills. The stock is cut into paving blocks at the creosoting plants; hence any transit arrangement for creosoting wood paving blocks necessarily carries with it the sawing and dressing of the lumber at the transit point. All the creosoting plants are equipped to cut blocks. Lockhart, Ala., and Bogalusa, La., are the principal producing points for paving block material, although complainant purchases some at Century, Fla. Complainant's competitors also buy their stock at Lockhart and Bogalusa. Planks and timbers, also piling and telegraph cross arms, are creosoted by complainant, and these it purchases principally at mills in Georgia, Florida, and Alabama, although it has also received them from Delaware, Maryland, and Virginia.

Complainant located its plant at Newark in 1910. Its principal competitors, most of whom constructed their plants since that time, are located in central territory, at Madison, Ill., Indianapolis and Bloomington, Ind., and Toledo, Ohio. There are other competitors at Broadford Junction, Pa., and Simpson, Miss. All of these operate under transit-rules which give them the benefit of the joint rates where they apply through the creosoting point, and some of them under rules which also authorize the application of the joint rates, plus out-of-line or back-haul charges, the same or substantially the

same in amount as those sought by complainant, where the joint rate is not applicable through the creosoting point. With the exception of Boardford Junction, which is not accorded the back-haul service, these plants are located on through routes to eastern consuming territory, and no back-haul movement is involved in shipments to that territory. Broadford Junction is not directly intermediate between the south and the consuming territory north and east of Newark, the creosoted product moving principally to points in western New York. No competitors are located upon the rails of the Pennsylvania or the Central. The creosoting-in-transit arrangement seems to be quite common except in trunk line territory.

There are creosoting plants other than that of complainant in trunk line territory, but complainant meets no competition of any consequence from these plants. This it ascribes partially to the fact that these plants do not have the transit arrangement, but chiefly to the fact that they do not seek to any great extent the business of the public, but confine their operations almost entirely to creosoting for railroads, telegraph companies, and electric-light companies. Many of these plants are said to be owned by the railroads and to have been operated at the time of the hearing by the United States Railroad Administration. Some of these eastern plants have refused business from the general public and turned inquiries over to the complainant. There are also some creosote dipping plants in New England, this process being principally used for shingles. Dipped lumber does not come into competition with complainant's product.

Competition is keen in the sale of creosoted wood products and especially so in the sale of wood paving blocks. Complainant sells its creosoted products on a margin of profit of about 5 per cent. It has lost many contracts on which it has bid at points in New England and in New York State, which its witness stated was because competitors having the transit arrangement were enabled to underbid it, due to the difference in freight rates. In other cases complainant has refrained from bidding, particularly in the territory lying between Newark and central territory because of its alleged disadvantage in the matter of freight rates. Although the demand for creosoted lumber has increased considerably within the past few years, complainant's commercial output, as distinguished from creosoting done for railroads, has somewhat decreased. The majority of its sales have been at near-by points in New Jersey and New York. Although the capacity of complainant's plant is 1,800 30-ton cars a year, in 1918 it shipped out only about 700 or 750 cars, and approximately the same number in 1917. Of these, 400 cars in 1918 consisted of ties owned by the Pennsylvania. This inability to operate its plant to capacity it attributes entirely to lack of transit arrangements. The following rates, among others cited by complainant, illustrate the disadvantage to complainant by reason of the adjustment assailed. The rate from Meridian, Miss., and grouped points to Boston, Mass., on basis of which creosoting in transit is permitted at the central territory points, is 43 cents, whereas complainant pays a rate of 53.5 cents from the same points to Boston, 39 cents to

Newark, and 14.5 cents beyond. The joint rate from Meridian to New York is 39 cents, while the combination on Newark is 47 cents, 39 cents to Newark and 8 cents beyond, resulting in a disadvantage to complainant, as compared with its central territory competitors of 8 cents. On shipments from Meridian to Portland, Me., complainant's central territory competitors have an advantage of 18.5 cents.

Much of defendants' testimony was directed toward showing the difficulty of policing a transit arrangement at complainant's plant. The year 1914, in which, as stated above, approximately 40 per cent of complainant's material was received by water, was said to be representative of any year prior to the world war. Defendants urge that while they would have a record of all material moving in by rail, they would have no record of the material arriving by water; that the lumber which arrives by water is not marked in any way to distinguish it from lumber arriving by rail; and that under such circumstances it would be impossible to preserve the identity of the inbound shipments of raw lumber material, and that no system of records would be adequate to prevent even unintentional substitution. The substitution at the transit point of one article for another, when not specifically authorized by the tariff, is unlawful and will subject the parties guilty thereof to criminal prosecution. Fabrication-in-Transit Charges, 29 I. C. C., 70; National Casket Co. v. S. Ry. Co., 31 I. C. C., 678. Defendants serving central territory provide transit arrangements similar to those sought by complainant, and the tariff of one of the defendants, the New York Central Railroad, governing creosoting in transit at Toledo, a lake port, and at other points on its line west of Buffalo, N. Y., or Clearfield, Pa., makes specific provision for policing nontransit tonnage whether received or forwarded by rail, boat, wagon, or otherwise. Defendants assert, however, that there is no movement by water to the plant at Toledo or to the plant at Madison, a Mississippi River point.

Neither the Pennsylvania nor the Central allows creosoting in transit or sawing and dressing of lumber in transit at any point upon its line. However, the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, a part of the Pennsylvania system, allows creosoting in transit at Indianapolis in accordance with its tariff I. C. C. No. 1414. Apparently there are no transit arrangements for creosoting of lumber on any of the lines in trunk line territory except at Broadford Junction on the Pittsburgh & Lake Erie Railroad. There are no transit arrangements for the dressing and sawing of lumber in that territory except on the Adirondack division of the New York Central Railroad where such arrangements were authorized a few years ago when the government removed the duty from rough lumber in order to encourage competition with the Canadian mills. This is in the nature of a government arrangement for the purpose of encouraging manufacturing in the United States. Lumber dealers throughout the state of New York have requested that sawing and dressing in transit be permitted but the carriers have consistently refused.

Defendants urge that to uphold the contention of complainant that as a matter of reasonableness under section 1 of the act it is entitled

to the establishment of the arrangement sought in this instance, would justify, if not require, the further extension of the arrangement to other creosoting plants throughout trunk line territory; and that the natural result would be that the lumber dealers in this territory would demand the granting of dressing and sawing in transit at their plants.

It is apparent that the question here presented is primarily one of alleged undue prejudice resulting from the granting of a creosoting-in-transit arrangement to complainant's competitors and the denial of a similar arrangement to complainant. The record establishes that on such traffic to points beyond Newark in eastern New York and in New England, which territory complainant asserts constitutes its natural market, it is unable, as to all-rail traffic at least, to meet the competition of creosoting plants in central territory by reason of the situation complained of. Complainant contends that so long as the Pennsylvania and the Central participate in joint rates under which the transit arrangement is allowed by the other lines they are necessarily chargeable with unjust discrimination and undue prejudice because they do not allow the arrangement at Newark on their own lines. On behalf of the Central and the Pennsylvania it is urged that they are not in anywise interested in or chargeable with the allowance of these transit arrangements by connecting lines. Those two carriers rely strongly upon Grain & Hay Exchange v. P. Co., 32 I. C. C., 409, Indianapolis Chamber of Commerce v. C., C., C. & St. L. Ry., 34 I. C. C., 267, Meridian Grain & Elevator Co. v. A. & V. Ry. Co., 38 I. C. C. 478, and other cases involving somewhat similar situations in which complaints alleging undue prejudice were dismissed. Those cases, however, were considered in Southern Hardwood Traffic Asso. v. Director General, 61 I. C. C., 132, decided this date, and found to be no longer controlling in view of the enlarged powers conferred upon us by the transportation act, 1920. In the case last cited we found that defendants' participation in tariffs carrying joint rates on lumber and forest products applying through Memphis, Tenn., or Louisville, Ky., and permitting in connection with such joint rates transit at certain points on the through routes, while contemporaneously denying similar transit at Louisville or Memphis, subjected the complainants therein to undue prejudice. The Central and the Pennsylvania, as well as other defendants herein, are parties to joint rates on creosoted lumber applying through Newark under which transit is permitted at competing plants on the through routes, but is denied to complainant at Newark, and thereby they became effective instruments of discrimination.

The fact, as shown by complainant, that transit arrangements are provided by defendants on other commodities which are not in any way competitive with creosoted lumber does not prove any unjust discrimination or undue prejudice against complainant. Nashville Lumbermen's Club v. L. & N. R. R. Co., 40 I. C. C., 59.

Complainant's request for the establishment of back-haul charges where the joint rates do not apply through Newark is based upon the ground that the outbound rates from Newark on the creosoted products are unreasonable. Complainant relies mainly upon two ex-

hibits, the first showing the divisions received by the lines north and east of Cairo, Ill., out of rates on lumber from points in the south and southwest to destinations in trunk line territory, which divisions for hauls of from 920 to 1,204 miles are said to be from 23.8 to 29.9 cents, the second being a comparison of the sixth-class rate of 18 cents applicable to wood paving blocks from Newark to a number of destinations in New York, including Albany, Rochester, Syracuse, and Utica, with commodity rates on the same product for hauls for similar distances from St. Louis, Madison, and Chicago, Ill., and Sandstone, Minn., to various destinations in Iowa, Missouri, Nebraska, and South Dakota. With reference to the first, it may be said that while divisions may be considered as evidence they are not conclusive and ordinarily do not afford a sound basis upon which to judge of the reasonableness of rates. The New York destinations shown in the second exhibit mentioned are at an average distance of 269 miles from Newark. The average haul to the western destinations is 296.5 miles and the average rate 11.67 cents. The distance rates of the Wabash Railroad applicable to the transportation of creosoted paving blocks from St. Louis to points in Missouri are also cited. While these comparisons indicate that the rates out of Newark to the particular destinations shown in the exhibits may be rather high, they are insufficient, standing alone, to support a finding and order for general application for the future.

Following Southern Hardwood Traffic Asso. v. Director General, supra, and upon the facts of record in this case, we find that the refusal of the Central and the Pennsylvania to establish creosoting-in-transit arrangements at Newark is not unreasonable, but that defendants, in so far as they respectively participate in tariffs carrying joint rates on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks, applying through Newark from points in southern classification territory to points in northern New Jersey, eastern New York, and in New England, and permitting in connection with such joint rates creosoting in transit at Madison, Indianapolis, Bloomington, Toledo, or Simpson, while contemporaneously denying similar transit arrangements at Newark, subject complainant to undue prejudice and disadvantage.

An appropriate order will be entered requiring the removal of the undue prejudice.

HALL, *Commissioner*, dissenting:

This case is similar in principle to Southern Hardwood Traffic Asso. v. Director General, 61 I. C. C., 132, and most of what is said in my dissenting expression there is applicable here.

In central territory the carriers accord the transit; in trunk line territory they do not. The Pennsylvania Railroad and Central of New Jersey, which serve Newark, do not accord the transit at any point on their lines. Nevertheless, because they participate in joint rates with carriers which permit transit in central territory, they must, under the majority report, allow the transit at Newark or cancel their participation in the joint rates, although the circumstances and conditions at Newark affecting the desired transit are plainly differ-

ent from those at points in central territory where transit is allowed, and although cancellation of the joint rate will not help Newark.

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 15th Day of March, A. D. 1921.

No. 10582.

AMERICAN CREOSOTING COMPANY

v.

JOHN BARTON PAYNE, Director General of Railroads; THE CENTRAL Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Western Maryland Railway Company, Erie Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad, and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company (The New York Central Railroad Company, Lessee); The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, Buffalo & Susquehanna Railroad Company, and New York, Ontario & Western Railway Company.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

And it appearing, That the Commission has found in said report that the above-named defendants, in so far as they respectively participate in tariffs carrying joint rates applying through Newark, N. J., on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to points in northern New Jersey, eastern New York, and in New England, and permitting in connection with such joint rates creosoting in transit at Madison, Ill., Indianapolis, Ind., Bloomington, Ind., Toledo, Ohio, or Simpson, Miss., while contemporaneously denying similar transit arrangements at Newark, N. J., on the same through routes, subject complainant to undue prejudice:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1921, and thereafter to abstain, from the undue prejudice found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 20, 1921, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

EXHIBIT D.

Law Department, C. R. R. of N. J., Jul. 5, 1921.

6773.

Interstate Commerce Commission.

No. 11009.

SOUTHERN HARDWOOD TRAFFIC ASSOCIATION et al.

v.

DIRECTOR GENERAL, ABILENE & SOUTHERN RAILWAY COMPANY, et al.

No. 11009.

SOUTHERN HARDWOOD TRAFFIC ASSOCIATION et al.

v.

DIRECTOR GENERAL, ABILENE & SOUTHERN RAILWAY COMPANY, et al.

Submitted December 9, 1920. Decided March 15, 1921.

1. Defendants' participation in tariffs carrying joint rates on lumber and forest products and permitting under such rates transit at certain points while contemporaneously denying similar transit upon the same through routes at Memphis, Tenn., and Louisville, Ky., subjects complainants to undue prejudice and disadvantage. Undue prejudice ordered removed.

2. Transit arrangements on lumber and forest products at Memphis and Louisville, of the character and extent prayed for by complainants, not shown to constitute a necessary transportation service which defendants should be required to furnish at a reasonable charge under section 15 of the act.

J. V. Norman and Norman & Graham for complainants.

R. V. Fletcher, William A. Northcutt, Claudian B. Northrop, C. P. Stewart, A. P. Humburg, and Henry G. Herbel for Director General of Railroads.

A. P. Humburg for Illinois Central Railroad Company, Yazoo & Mississippi Valley Railroad Company, and Chicago, Memphis & Gulf Railroad Company; William A. Northcutt and William Burger for Louisville & Nashville Railroad Company; Henry G. Herbel and James M. Chaney for Missouri Pacific Railroad Company; Claudian B. Northrop for Southern Railway system and Mobile & Ohio Railroad Company; R. A. Chadwick for Mobile & Ohio Railroad Company; C. P. Stewart for Cleveland, Cincinnati, Chicago & St. Louis Railway Company; George E. Schnitzer for Chicago, Rock Island & Pacific Railway Company; A. J. Lehmann for St. Louis Southwestern Railway Company, and L. P. Nash for St. Louis-San Francisco Railway Company.

Ray Williams for Cairo, Ill., lumber interests and L. S. McDonald for certain Arkansas lumber interests, interveners.

Report of the Commission.

DANIELS, *Commissioner:*

The issues here presented were made the subject of a proposed report by the examiner. Exceptions thereto were filed and oral argument has been had thereon.

The complaint herein was filed November 10, 1919, by certain hardwood lumber dealers and manufacturers of Memphis, Tenn., and Louisville, Ky., individually and as members of an unincoporated association. Practically all common carriers subject to the interstate commerce act are named as defendants. The gravamen of the complaint is defendants' refusal to establish transit arrangements under which hardwood lumber and forest products, originating at points in the south and southwest and destined to points in the north, east, and west, may be stopped at Memphis or Louisville, through routes and joint rates being applicable via those respective cities, for yarding, assorting, grading, drying, dressing, or further manufacture. It is alleged that such transit arrangements are accorded dealers at Buffalo, N. Y., Toledo, Ohio, Chattanooga, Tenn., and elsewhere in connection with through routes and joint rates applying also via Memphis or Louisville, and that complainants are thereby subjected to undue prejudice, in violation of section 3 of the act. Another allegation of undue prejudice is predicated on the fact that transit is permitted at Memphis and Louisville on grain, cotton, and other articles but denied on lumber. It is further alleged that the

transit arrangement desired by complainants is a commercial necessity to the lumber industry, and that the transportation service incident thereto is a necessary transportation service which defendants should be required to furnish at Memphis and Louisville at a reasonable charge under section 15 of the act. We are asked to establish reasonable and nondiscriminatory rules and charges governing transit on lumber and forest products, whether hardwood or pine, originating at points in the states south of the Ohio and Potomac rivers and east of the Mississippi River and at points in the states of Louisiana, Texas, Arkansas, Missouri, and Oklahoma when the lumber is stopped at Memphis or Louisville for yarding, assorting, grading, drying, dressing, or further manufacture into articles taking the lumber rates, and reshipped to points of destination north of the Ohio River, to points in the states of Virginia and West Virginia, and to points in western trunk line and trans-Missouri territories, provided the joint rates between said points of origin and destination apply via Memphis or Louisville and no back hauls are involved.

Intervening petitions in opposition to the complaint were filed in behalf of certain lumber dealers at Cairo, Ill., and at various points in Arkansas.

Complainants urge that the tracts of timber from which hardwood lumber is cut in the southern states are comparatively small in size and widely scattered, and that much of the sawing is done by small mills, some of which are portable and are operated by farmers. The average daily capacity of one of these small saw mills is from 5,000 to 7,000 feet, and the output consists of different sizes, grades, and varieties of lumber. The original establishment of transit arrangements on hardwood lumber at various points in the south a number of years ago grew out of the following circumstances and conditions. The consuming markets of hardwood lumber require it in carload lots of certain sizes, species, and grades, and, as it was impossible under the conditions then existing, for a small mill to accumulate a stock large enough to enable it to make shipments direct to consuming points, concentrating yards were established at various places, to which lumber was shipped from the small mills, there assorted, graded, dried, and dressed, and later reshipped to meet the requirements of the trade. See Nashville Lumbermen's Club v. L. & N. R. R. Co., 40 I. C. C., 59, 60.

In 1896 Memphis began to grow in importance as a lumber market, and from 1900 to 1908 it was the largest wholesale hardwood market in the country, due in part to its geographical situation but mainly to a reconsigning or reshipping arrangement which for many years had been maintained by the railroads serving it, under which dealers there could ship in lumber from southern and western territory, unload, yard, assort, grade, and dry it, and within 90 days reship it to eastern and northern points at rates approximately from 2 to 4 cents per 100 pounds less than the combination of rates to and from Memphis, but not less than, although in many instances the same as, the through rates. In 1908 a complaint was filed with us by a lumber dealer at Cairo. Via this point through rates were ordinarily made on the Cairo combination. The complainant alleged

that Cairo was unduly prejudiced by the arrangement accorded Memphis; and in September, 1908, pending our decision, the arrangement at Memphis was withdrawn. There was substituted a reshipping tariff, still in force, providing proportional rates on lumber yarded at Memphis and subsequently reshipped, the combination of inbound and outbound rates under this tariff being in general 1 cent per 100 pounds less than the full combination but higher than the through rates then in effect. In our decision in that proceeding, Sondheimer Co. v. I. C. R. R. Co., 17 I. C. C., 60, decided June 29, 1909, we found that the reshipping arrangement at Memphis, if proper rates were applied thereunder, was not unduly prejudicial to Cairo, and that the rates established following the filing of the complaint were apparently satisfactory to the various interests and removed the cause of complaint. At the present time there is also an arrangement permitting rough lumber to be drawn into Memphis from points on the Illinois Central system, to be dressed or manufactured into flooring, ceiling, or other smaller pieces of lumber, and reshipped at the through rate from the original point of shipment to final destination, plus a transit charge of 2 cents per 100 pounds. The only other transit arrangement available to Memphis dealers is one maintained by the Missouri Pacific on lumber originating at points west of the Mississippi River. This arrangement allows the lumber to be stacked, dried, graded, and manufactured at Memphis and reshipped on the basis of the through rate from point of origin to final destination. The withdrawal of the general transit arrangement from Memphis in 1908, together with subsequent greater increases in the aggregates of the in-and-out rates than in the through rates, coincided with the marked decline of that city as a hardwood market, as is shown by the fact that there are now only one or two yards doing a straight rehandling business compared with 31 in 1908.

As the hardwood lumber industry developed in the south, Louisville also became an important hardwood market, though without the aid of transit arrangements, for the reason that originally all lumber rates broke on the Ohio River crossings. Hence, dealers at Louisville were able to bring in lumber, hold it indefinitely, and ship it out in any form desired on the combination of local rates. In Norman Lumber Co. v. L. & N. R. R. Co., 22 I. C. C., 239, we refused to require the establishment of a transit arrangement at Louisville in order to eliminate alleged undue preference of Memphis under the then existing relationship, but held that inasmuch as Louisville as well as Cairo was a rate-breaking point in the construction of through rates there was no necessity for the establishment of transit at Louisville, and that the situation should be corrected by fixing a proper relationship between the Louisville rates and those applying through Cairo, the latter having been adjusted with respect to the Memphis rates as a result of the Sondheimer Case, supra. In recent years, however, the practice of constructing through rates on lumber from the south by combination to and from Louisville or other Ohio River crossings has been gradually abandoned, and at the present time almost no through rates are so made. As a result of this

change, it is testified, about 16 concerns have been forced to give up the rehandling of lumber at Louisville. Those who have remained in business, in the hope of regaining the advantages which they possessed under the former rate adjustment, for several years have urged the carriers to accord them transit arrangements in connection with the through rates, but without success.

The handicap imposed on Memphis and Louisville by the loss of the positive advantages which they formerly enjoyed as rehandling points for lumber has been further increased because of the fact that carriers serving Buffalo, Grand Rapids, Mich., Fort Wayne and Logansport, Ind., and Toledo, permit transit on lumber at those points in connection with joint rates on lumber from southern points to destinations in the north and east, applying via Louisville or Memphis or both. While at the time of our decision in the Sondheimer Case, supra, complainant's principal competition apparently was with Ohio River points, the record indicates that complainants now encounter vigorous competition from dealers located at all of the northern cities named above, but in particular from those at Buffalo. From an examination of the tariffs it appears that transit arrangements protecting the through rate on rough hardwood lumber from the south stored, assorted, or dried were not established at Buffalo until July, 1912. Apparently such transit arrangements were originally established by the Buffalo lines in connection with traffic from the west, the natural route of which lay through Buffalo, the location of which point at the eastern extremity of Lake Erie made it a convenient point of concentration and reshipment of that traffic. But when the source of a large portion of the lumber supply veered from the west and northwest to the south the Buffalo carriers, so far as was within their power, cooperated with lumber dealers at Buffalo, through the medium of favorable rates and services, in aiding them to retain their interest in the traffic. Lumber Transit Privileges at Buffalo, N. Y., 52 I. C. C., 31, 38. As above shown, this operated to the serious disadvantage of Memphis and Louisville, notwithstanding their long recognized advantages as concentrating points on lumber from the south and the natural advantages of their favorable location with respect to the southern source of supply. To a somewhat less extent complainants also are in competition with lumbermen at Chattanooga, Meridian, Miss., and other southern points, who are accorded transit arrangements by the Southern Railway Company. The transit arrangements available to complainant's competitors vary in detail, but in general they permit lumber to be stopped for yarding, assorting, drying, or further manufacture and to be reshipped at much lower total transportation charges than complainants are forced to pay in rehandling lumber originating at the same points and reshipped to the same points of destination. The disadvantage of Memphis and Louisville, in contrast with the above-named transit points, is shown by a number of illustrative exhibits, based upon uniform loads of 50,000 and 60,000 pounds, to range from $2.50 to $7 per car, based on the rates in effect prior to Increased Rates, 1920, 58 I. C. C., 220.

Complainants also desire the establishment of arrangements which

will permit the manufacture of finished staves, heading, and cooperage material from rough staves and their subsequent shipment to northern and eastern destinations on the through rates applicable to lumber originating at the same points and shipped to the same points of ultimate destination. At the present time the Louisville & Nashville permits such transit at Louisville on lumber originating at Kensett, Ark., but the evidence shows that no use has been made of this arrangement and that its withdrawal is contemplated. It is testified that competing manufacturers at Dickson, Tenn., Bay City, Mich., Cleveland, Ohio, Toledo, and Buffalo are able to ship lumber from the south and southwest and stop it in transit for manufacture into cooperage material at those points on through rates, whereas Louisville manufacturers must pay considerably higher combination rates.

Although complainants disclaim any attack upon the reasonableness of the local rate to and from Memphis and Louisville, they point out that the disadvantages of those cities as rehandling points for lumber were augmented by the rate increase of 25 per cent, with a maximum of 5 cents per 100 pounds, under general order No. 28 of the Director General of Railroads. This increase was applied both to the inbound and outbound rates paid by complainants but only once to the through rates available to their competitors at Buffalo and elsewhere. For example, prior to June 25, 1918, the joint rate from Beaumont, Tex., to Cleveland was 32.8 cents and the combination rate via Memphis was 39.8 cents. Under general order No. 28 the joint rate became 38 cents and the combination rate 49 cents. In this manner the spread between various joint rates applicable via Memphis and Louisville and the combination rates constructed on those points was increased as much as 4.7 cents per 100 pounds in some instances. A representative of Cairo lumber dealers, interveners, also protested against the double increases under general order No. 28, but opposed the extension of transit arrangements as a means of readjusting relationships between various markets.

While complainants aver that they are prejudiced chiefly by the transit arrangements accorded Buffalo and other northern cities and concede that the prejudice could be removed by the withdrawal of transit from their competitors, they strongly urge that transit should be established at Memphis and Louisville not only to correct the alleged violations of the third section of the act but also for reasons of so-called "commercial necessity." They assert that the small sawmills in the south need constant supervision and financial aid and that, because of the geographical situation of Memphis and Louisville, dealers at those points are better able to furnish this aid and thereby increase the production of the small mills, provided their output could be profitably rehandled. In this connection it is testified that the number of small mills in operation to-day is not more than 25 per cent of that in 1907, and that the granting of transit at Memphis would increase the production of lumber from 25 to 30 per cent because the operators of small mills prefer to deal with wholesalers close to home. In calling attention to the widespread establishment of transit arrangements on lumber, complainants cite 22 such

arrangements which were granted in the southern region by the United States Railroad Administration, with a transit charge in most instances of 2 cents per 100 pounds. They also cite transit arrangements in effect at southern points on other commodities, particularly cotton, cottonseed oil, and grain. Complainants submit a set of proposed rules to govern the transit arrangement which they desire, permitting—

the stopping for yarding, assorting, grading, drying, dressing, or further manufacture into dressed lumber, box and barrel material, ceiling, flooring, handles in the rough, heading, hoops, lumber siding, spokes, club turned, staves and vehicle material in the rough or in the white, and its forwarding to a subsequent and further destination, and will apply to such lumber, etc., as passes through lumber mills, storage yards, warehouses, or factories.

The processes listed above appear to be more numerous and varied than those now permitted at any one competing point, but complainants state that they would be satisfied with the same general kind of transit now granted by the Southern Railway at Chattanooga, Meridian, and elsewhere, which includes sorting, drying, and dressing. The proposed rules do not include a "kind for kind" rule, nor provide for daily reports, and complainants cite a number of transit tariffs from which such provisions have been omitted.

The principal lumber-carrying lines serving Louisville and Memphis are the Louisville & Nashville and the Illinois Central. Both oppose the extension of transit arrangements applying to lumber. The Southern Railway, whose lines also reach Memphis and Louisville, is willing to accord transit on the same terms on which it is granted at other points on its lines, but the Southern has relatively few joint rates applicable through Memphis or Louisville. At the hearing representatives of the St. Louis-San Francisco Railway offered to extend to Memphis the same reshipping arrangements maintained by it at other points on its line. This offer was accepted by complainants, who thereupon withdrew their complaint, so far as transit at Memphis is concerned, as to that line, as well as to the St. Louis Southwestern Railway and the Missouri Pacific Railroad which reach Memphis from the west but participate in no joint rates via that city and the completing points north of the Ohio River. The Chicago, Rock Island & Pacific Railway, which enters Memphis from the west, opposes the granting of transit at that point, on the grounds, among others, that it does not participate in the haul beyond and that Arkansas and Louisiana milling points would be subjected to disadvantage.

Defendants deny that there is any commercial necessity for the establishment of the transit arrangements desired by complainants. They submit testimony tending to prove that most of the hardwood lumber originating in territory served by the Illinois Central is now manufactured by large mills, permanently situated at various points, including Memphis, said by complainants to be the world's largest manufacturing center for hardwood lumber. It is testified that the

small mills are much less important now than when the hardwood lumber industry in the south was in its experimental stage, and that the operators of the small mills have never complained to the carriers of any difficulties in marketing their product because of the absence of transit arrangements at Memphis and Louisville. It is further stated that most of the output of the small mills goes directly to consuming markets, only a small part being rehandled at points where transit is available.

The Illinois Central and Louisville & Nashville object to the establishment of transit at Memphis and Louisville, on the ground that it would result in a material sacrifice of revenue, and would necessitate the granting of similar arrangements at other points on their lines. They also call attention to the fact that transit requires a double car supply and additional terminal service and urge, therefore, that it results in a waste of transportation. Furthermore, they contend that, as the rates on hardwood lumber from originating points in the south are not blanketed but graded according to distance, transit would enable dealers to manipulate the billing of their inbound shipments so as to secure the lowest freight charges and make it impossible for the carriers to protect the integrity of their through rates. Another objection is that the granting of transit at Memphis and Louisville would disturb the existing relationship between rates applying via those points and those via other Ohio River crossings.

Complainants' contention, as stated on brief, that "transit on lumber and forest products at Louisville and Memphis is a commercial necessity and the transportation service incident thereto is a necessary transportation service which the carriers should be required to furnish at a reasonable cost," is not persuasive. In The Five Per Cent Case, 31 I. C. C., 351, 408, we said that transit is not part of the transportation service, such as the expedited movement of freight, but "something offered to the shipper in addition to the transportation service." While our power to require the establishment of transit arrangements in appropriate cases by virtue of our jurisdiction over the practices and regulations of carriers is no longer open to question, and this power has been exercised on occasion, the record discloses no sufficient basis for its exercise here.

The relevant issue presented is that of undue prejudice and preference. For the alleged undue preference of Buffalo and other transit cities the Illinois Central and Louisville & Nashville urge that they can not be held responsible, inasmuch as those arrangements are maintained by other lines and provided for in the individual tariffs of the latter, in which the two lines named do not concur. They quote provisions in their own lumber tariffs to the effect that the granting of transit and performance of special services shall be entirely upon the responsibility and at the cost of the carrier granting the transit and performing the services, and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier.

Lumber Transit Privileges at Buffalo, N. Y., 33 I. C. C., 601, and 52 I. C. C., 31, which dealt with the transit arrangements on

hardwood lumber at Buffalo and the relation of the southern carriers thereto, is cited in support of their contention. In that proceeding the lines serving Buffalo sought to obtain from the southern carriers increased divisions of joint rates on hardwood lumber shipped from the south and stopped for transit at Buffalo. We there held that, although the southern lines permitted connecting carriers to accord transit at Buffalo under the through rates, the transit arrangements were maintained by the Buffalo carriers so largely for their own benefit that the expense thereof should be borne by them. The southern carriers argued in that proceeding that participation by them in the Buffalo arrangements through shrinkage of their divisions would make them parties to discriminations against points in central territory and on their own lines where no transit was accorded; and they now argue that since they do not participate in the transit at Buffalo they are innocent of any unlawful discrimination against Memphis and Louisville. That proceeding, however, dealt primarily with the matter of divisions, which question was of direct concern only to the connecting carriers; and while we mentioned some of the more important arguments against the demand of complainants therein that the southern lines be required to participate in the transit arrangements at Buffalo, we expressly stated that we would not undertake to determine whether the attitude of the southern lines was correct, or to discuss in detail their objections to transit in general and participation in the particular transit arrangements involved in that proceeding.

The question presented, as stated by complainants, is whether, where transit is granted at one or more points on a through route and in connection with a joint rate it must be granted at all similarly situated points on the same through route where it is necessary or desirable, is one on which our decisions, unless allowance is made for distinguishing features in the various cases, have not been uniform. In the following cases, among others cited by defendants, we held in substance that undue prejudice did not exist by reason of such a situation where, as in those cases, it appeared that the defendants serving the points at which transit was sought were not interested in or chargeable with the transit arrangements granted in a territory far removed from the alleged prejudicial point by connecting carriers parties to the through routes and joint rates. Grain & Hay Exchange v. P. Co., 32 I. C. C., 409; Indianapolis Chamber of Commerce v. C., C., C. & St. L. Ry., 34 I. C. C., 267; Meridian Grain & Elevator Co. v. A. & V. Ry. Co., 38 I. C. C., 478.

While those cases may be distinguished from the instant case upon the facts, in that they involved a possible extension of a transit arrangement to a territory which theretofore had been free from that practice whereas transit arrangements of various kinds on lumber are now accorded by most of the carriers serving the general territory in which Memphis and Louisville are located, it is difficult to distinguish them in principle. However, those cases were decided at a time when our power to regulate the rates and practices of carriers was not as broad as it now is. By the transportation act, 1920, our

powers were greatly enlarged and among other things we have been given authority to establish minimum rates. Even prior to the transportation act, we had held in other cases where no question of extending transit into a new territory was involved, that so long as lines forming through routes and publishing joint rates applicable thereto allow transit on basis of the through rates at some points, they may be required to accord transit on the same basis at competing points on such through routes. Rates on Grain Milled in Transit, 35 I. C. C., 27; Henderson Commercial Club v. I. C. R. R. Co., 36 I. C. C., 20.

In Rates on Grain Milled in Transit, supra, we said, at page 31:

Respondent's line from East St Louis to Louisville and Cincinnati and lines south of these Ohio River crossings have formed through routes and published joint through rates from East St. Louis to points in southeastern and Carolina territories, and so long as these lines allow transit on the basis of the through rates at some points on these through routes they may properly be required to accord transit on the same basis at other milling points on these through routes. It is no answer to this proposition for respondent to say that, as an East St. Louis-Cincinnati line, it has no control over what the Louisville & Nashville, as a Cincinnati-southeastern territory line, permits in the way of transit at Atlanta, for example. By forming through routes and publishing through rates applicable thereto both of these carriers have merged their lines into one route or line so far as the particular traffic covered by these through rates is concerned. As a single through route or line, they can not withhold from some points on that route valuable services which they voluntarily perform at other points on that route.

We are of opinion that the decision last cited, applied in the light of East Tenn., etc., Ry. Co. v. Interstate Com., 181 U. S., 1, which recognizes the right of carriers to take into consideration actual competition when fixing rates affecting competitive points, announces the correct view, and that the principle announced therein controls in the instant case and must be followed if unlawful discriminations are to be avoided.

The evidence shows unmistakably that the transit arrangements in effect at Buffalo, Toledo, Grand Rapids, Fort Wayne, Logansport, Chattanooga, and Meridian in connection with joint rates applicable via those points as well as via Memphis or Louisville, to which the lines serving the latter cities, where no such transit is permitted, are parties, subject complainants to undue prejudice.

With respect to the desired transit arrangements on cooperage material, it is testified that complainants compete with dealers at Dickson, Bay City, Cleveland, Toledo, and Buffalo, all of whom are accorded transit by carriers serving those points. The character of the transit at Buffalo is not shown of record, and it appears that the arrangement at Dickson relates to rates which do not apply via Memphis or Louisville. At Cleveland, Toledo, and Bay City cooperage material may be stopped in transit for dressing, sorting, storing, grading, mixing, rehandling, kiln drying, or manufacturing in connection with rates applying via Memphis or Louisville.

The contention of complainants that lumber and forest products are also unduly prejudiced by reason of the fact that at Memphis and Louisville transit is accorded on grain, iron and steel, cotton, and various other commodities fails because of the absence of any competitive relationship between the respective commodities. Meridian Grain & Elevator Co. v. A. & V. Ry. Co., supra.

The Illinois Central and Louisville & Nashville can not avoid responsibility for the preference enjoyed by Buffalo and the other named points on the ground that they do not concur in the transit arrangements accorded the preferred cities. By entering into, and participating in, through routes and joint rates in connection with which transit is permitted at Buffalo and elsewhere, while like transit arrangements are denied at Louisville or Memphis on the same through routes, those two carriers, as well as all other carriers parties to the through routes and joint rates, become effective instruments of discrimination. The matter of according transit at a certain point should not be regarded from the standpoint alone of one carrier in the through route, but from the standpoint of all the carriers comprising the through route. Henderson Commercial Club v. I. C. R. R. Co., supra. In St. Louis S. W. Ry. Co. v. United States, 245 U. S., 136, the Supreme Court said:

> Localities require protection as much from combinations of connecting carriers as from carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it.

See also Commercial Club of Omaha v. B. & O. R. R. Co., 52 I. C. C., 255, 264.

The difficulties which the Illinois Central and Louisville & Nashville apprehend in policing transit at Memphis and Louisville are not controlling on the issue of undue prejudice as it does not appear that any greater difficulty in policing would be experienced at those points than at the other points on the through route which are now accorded transit.

With respect to the objections urged by those carriers, that they have no control over the transit arrangements accorded by their connections, and that the establishment of similar transit at Memphis and Louisville would adversely affect their revenues, it may be said in reply that if those carriers are assured of a reasonable return for the additional services rendered in according the transit at Memphis and Louisville, it does not appear that they have any just cause for complaint. The record does not afford a sufficient basis for determining what would be a reasonable transit charge to apply at Memphis and Louisville on lumber transited at those points. If the existing transit arrangements on the through routes from and to the territories involved are continued in effect, all of the defendants who are parties thereto will be expected to establish transit arrangements and charges which will effect substantial equality as between the various transit points. If the Illinois Central or Louisville & Nashville, in establishing similar transit arrangements, conceive that their

revenues are adversely affected by the failure of their connections to establish reasonably compensatory transit charges, the matter may be brought to our attention in an appropriate proceeding.

We find that defendants, in so far as they respectively participate in tariffs carrying joint rates on lumber and forest products applying through Memphis or Louisville from the territories of origin to the territories of destination embraced in the complaint, and permitting in connection with such joint rates transit at Buffalo, N. Y., Toledo, Ohio, Grand Rapids, Mich., Fort Wayne and Logansport, Ind., Chattanooga, Tenn., or Meridian, Miss., while contemporaneously denying similar transit arrangements at Louisville or Memphis on the same through routes, subject complainants to undue prejudice and disadvantage. As stated, the complaint was withdrawn as to three of the defendants, so far as transit at Memphis is concerned, and this finding is not to be understood as applying to those three carriers with respect to transit at Memphis.

An appropriate order will be entered.

HALL, *Commissioner*, dissenting:

The principles announced in Schmidt & Sons v. M. C. R. R. Co., 19 I. C. C., 535; Grain & Hay Exchange v. P. Co., 32 I. C. C., 409; Indianapolis Chamber of Commerce v. C., C., C. & St. L. Ry., 34 I. C. C., 267; and Meridian Grain & Elevator Co. v. A. & V. Ry. Co., 38 I. C. C., 478, are sound and should govern here.

The Louisville & Nashville and Illinois Central consistently refuse to accord transit on lumber. They participate in joint rates under which transit is allowed by their connections north of the Ohio River. Their lumber tariffs specifically provide that they will not be responsible for the granting of transit privileges by their connections. Under these circumstances they are not, in my opinion, chargeable with undue prejudice because they fail to provide transit upon request at Memphis and Louisville on their own lines.

An undue prejudice is one which the carrier can cure by alternative methods at its choice. If the Louisville & Nashville and the Illinois Central had the power, at their choice, to effect discontinuance of the transit service at Buffalo, for example, or to install the like at Memphis and Louisville, they would be responsible for the undue prejudice found and could be required to remove it. But now they have no real alternative. If they do not accord transit at Memphis and Louisville, the most that they can do is to cancel their participation in the joint rates under which their connections north of the river accord transit at Buffalo. Yet the law fosters joint rates, and in a proper proceeding we can require their reestablishment.

Meantime Buffalo will have had the transit. Memphis and Louisville will not and the majority report finds no sufficient basis in the record for requiring its establishment in those two cities. I think we should not fasten a finding of undue prejudice upon a carrier not responsible for the difference in treatment and without power to remove it. Transit is only one of the many accessorial services which one carrier in a chain of communication may see fit to accord and another to withhold. That chain may stretch from the Gulf

to the lakes, or from one ocean to the other, through many varying local transportation conditions.

I can give no adherence to the view that because one carrier in that chain responds to the conditions under which it operates by affording an accessorial service of some kind at points on its line, every other carrier in the chain may be required to do the like or withdraw from the joint rate. That view is not formulated in the majority report but seems to follow from it as a logical conclusion.

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 15th Day of March, A. D. 1921.

No. 11009.

SOUTHERN HARDWOOD TRAFFIC ASSOCIATION et al.

v.

JOHN BARTON PAYNE, Director General of Railroads; ABILENE & Southern Railway Company; Aberdeen & Rockfish Railroad Company; Adirondack & St. Lawrence Railroad Company; The Akron, Canton & Youngstown Railway Company; Alabama & Mississippi Railroad Company; Alabama & Tombigbee Railroad Company; Alabama & Vicksburg Railway Company; Alabama Central Railroad Company; Alabama, Florida & Gulf Railroad Company; Alabama Great Southern Railroad Company; The Alabama Northern Railway Company; Alabama & Northwestern Railroad Company; Alabama, Tennessee & Northern Railroad Corporation; Albany Southern Railroad Company; Alexander & Eastern Railway Company; Alexandria & Western Railway Company; Allegheny & South Side Railway Company; Alton & Southern Railroad Company; Ashland, Odanah & Marengo Railway Company; The Minal Railway Company; Angelina & Neches River Railroad Company; Ann Arbor Railroad Company; Annapolis & Chesapeake Railroad Company; Apalachia & Cleveland Railway; Apalachicola Northern Railroad Company; Appalachian Railway Company; Aransas Harbor Terminal Railway Company; Arcade & Attica Railroad Corporation; Arcadia & Betsey River Railway Company; Arkansas & Louisiana Midland Railway Company; Arkansas Central Railroad Company; The Arkansas, Oklahoma & Western Railroad Company; Arkansas, Red River & Paris Railway Company; The Arkansas Western Railway Company; Arlington Railroad Company; Aroostook River Railroad; Aroostook Valley Railroad Company; Artesian Belt Railroad Company and W. W. King, Receiver; Asherton & Gulf Railway Company; Asheville & Craggy Mountain Railway Company; Ashland Coal & Iron Railway Company; Ashland, Odanah & Merengo Railway Company; The Atchison, Topeka & Santa Fe Railway Company; Atlanta & St. Andrews Bay Railway Company; Atlanta & West Point Railroad

Company; Atlanta, Birmingham & Atlantic Railway Company; Atlanta Terminal Company; Atlantic & Western Railroad Company; Atlantic & Yadkin Railway Company; Atlantic City & Shore Railroad Company and C. L. Cole, receiver; Atlantic City Railroad Company; Atlantic Coast Line Railroad Company; Atlantic Northern Railway Company; Atlantic, Waycross & Northern Railroad Company; Augusta & Summerville Railroad Company; Augusta Belt Railway Company; Augusta Northern Railway; Augusta Southern Railroad Company;

Baltimore & Ohio & Chicago Railroad Company (Illinois); Baltimore & Ohio & Chicago Railroad Company (Ohio & Indiana); Baltimore & Ohio Chicago Terminal Railroad Company; The Baltimore & Ohio Railroad Company; The Baltimore & Ohio Railroad Company in Pennsylvania; Baltimore, Chesapeake & Atlantic Railway Company; Baltimore Steam Packet Company; Bangor & Aroostook Railroad Company; Bare Rock Railroad Company; Bartlett-Western Railway Company; Batesville Southwestern Railroad; Bath & Hammondsport Railroad Company; Bauxite & Northern Railway Company; Bay Terminal Railroad Company; The Beaumont, Sour Lake & Western Railway Company; Beaver Valley Railroad Company; The Bedford Stone Railway Company; Bedlington & Nelson Railroad Company; Bellefonte Central Railroad Company; The Belt Railway Company of Chicago; Bennettsville & Cheraw Railroad Company; Benton & Fairfield Railroad Company; Benwood & Wheeling Connecting Railway Company; Bessemer & Lake Erie Railroad Company; Bevier & Southern Railroad Company; Big Fork & International Falls Railway Company; Big Sandy & Kentucky River Railway Company; Birmingham & Atlantic Railroad Company and Geo. R. Williams, receiver; Birmingham & Northwestern Railway Company; Birmingham & Southeastern Railway Company; Birmingham Belt Railroad Company; Birmingham, Columbus & St. Andrews Railroad Company and A. D. Campbell, receiver; Birmingham Southern Railroad Company; Birmingham Terminal Company; Blaney & Southern Railway Company; Bloomsburg & Sullivan Railroad Company; Blue Ridge Railway Company; Blytheville, Burdette & Mississippi River Railway Company; Blytheville, Leachville & Arkansas Southern Railroad Company; Bonlee & Western Railway Company; Boston & Albany Railroad Company (The New York Central Railroad Company, lessee); Boston & Maine Railroad and J. H. Hustis, temporary receiver; Boyne City, Gaylord & Alpena Railroad Company; Brooklyn Eastern District Terminal; Bristol Railroad Company and Ralph Denio, receiver; Brownstone & Middletown Railroad Company; Buffalo & Susquehanna Railroad Corporation; The Buffalo Creek & Gauley Railroad Company; The Buffalo Creek Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; Bush Terminal Railroad Company; Butler County Railroad Company;

Cache Valley Railroad Company; Caddo & Choctaw Railroad Company; Cadiz Railroad Company; Calumet, Hammond & Southeastern Railroad Company; Camas Prairie Railroad Company;

Cambria & Indiana Railroad Company; Canada Steamship Lines, Ltd.; The Canadian Pacific Railway Company; Canton Railroad Company; The Cape Girardeau Northern Railway Company and J. W. Fristoe, receiver; Carman & Jefferson Railroad; Caro Northern Railway Company; Carolina & Northwestern Railway Company; Carolina & Tennessee Southern Railway Company; The Carolina & Yadkin River Railway Company; Carolina, Clinchfield & Ohio Railway; Carolina, Clinchfield & Ohio Railway of South Carolina; Carolina Railroad Company; Carrollton & Worthville Railroad Company; Cassville & Western Railway Company; Catskill New York Steamboat Company, Ltd.; Cazenovia Southern Railroad Company; Cedar Rapids & Iowa City Railway; Central New England Railway Company; Central New York Southern Railroad Corporation; Central of Georgia Railway Company; Canadian National Railways; The Central Railroad Company of New Jersey; Central Railway Company of Arkansas; Central Vermont Railway Company; Central West Virginia & Southern Railroad Company; The Champlain Transportation Company; Charles City Western Railway Company; Charleston & Western Carolina Railway Company; Charlotte Harbor & Northern Railway Company; Charlotte, Monroe & Columbia Railroad Company; Chattahoochee Valley Railway Company; The Chesapeake & Ohio Railway Company; The Chesapeake & Ohio Railway Company of Indiana; Cheasapeake Beach Railway Company; Chesapeake Western Railroad Company; Chesapeake Western Railway; Chesterfield & Lancaster Railroad Company; Chestnut Ridge Railway Company; The Chicago & Alton Railroad Company; Chicago & Calumet River Railroad Company; Chicago & Eastern Illinois Railroad Company and Thos. D. Heed, receiver; Chicago & Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Chicago & Kalamazoo Terminal Railroad Company; Chicago & Kenosha Railway Company; Chicago & North Western Railway Company; Chicago & Western Indiana Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Harvard & Geneva Lake Railway Company; Chicago Heights Terminal Transfer Railroad Company; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; Chicago, Kalamazoo & Saginaw Railway Company; The Chicago, Lake Shore & South Bend Railway Company; Chicago, Memphis & Gulf Railroad Company; Chicago, Milwaukee & Gary Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, North Shore & Milwaukee Railroad; Chicago, Ottawa & Peoria Railway Company; Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and Wm. Cotter, receivers; Chicago, Racine & Milwaukee Line; The Chicago River & Indiana Railroad Company; The Chicago, Rock Island & Gulf Railway Company; The Chicago, Rock Island & Pacific Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Chicago Short Line Railway Company; Chicago, Terre Haute & Southeastern Railway Company; Chicago, West Pullman & South-

ern Railroad Company; The Cincinnati & Westwood Railroad Company; Cincinnati, Burnside & Cumberland River Railway Company; Cincinnati, Flemingsburg & Southeastern Railroad Company; Cincinnati, Georgetown & Portsmouth Railroad; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati, Lebanon & Northern Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Cincinnati Northern Railroad Company; Clarendon & Pittsford Railroad Company; The Cleveland & Buffalo Transit Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Cliffside Railroad Company; Clinton & Oklahoma Western Railway Company; Clinton, Davenport & Muscatine Railway Company; Colfax Northern Railway Company; Columbia, Newberry & Laurens Railroad Company; Cooperstown & Charlotte Valley Railroad Company; Cornwall Railroad Company; Coudersport & Port Allegany Railroad Company; Crittenden Railroad Company; The Cumberland Railroad Company; Cumberland Railway Company; Cumberland & Pennsylvania Railroad Company; Cumberland Transportation Company; The Cumberland Valley Railroad Company;

Dansville & Mount Morris Railroad Company and A. S. Murry, receiver; Danville & Western Railway Company; Dardanelle & Russellville Railroad Company; Davenport, Rock Island & Northwestern Railway Company; The Dayton & Union Railroad Company; The Dayton Union Railway Company; De Kalb & Western Railroad Company; De Queen & Eastern Railroad Company; The Delaware & Hudson Company; Delaware & Northern Railroad Company; The Delaware, Lackawanna & Western Railroad Company; Delaware River & Union Railroad Company; The Delaware Valley Railway Company; Delray Connecting Railroad Company; The Des Moines Western Railway Company; The Des Moines Union Railway Company; The Dayton, Toledo & Chicago Railway Company; The Detroit & Huron Railway Company; Detroit & Mackinac Railway Company; Detroit & Toledo Shore Line Railroad Company; Detroit, Bay City & Western Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Detroit Terminal Railroad Company; Detroit, Toledo & Ironton Railroad Company; The Dominion Atlantic Railway Company; Dominion Transportation Company; Doniphan, Kensett & Searcy Railroad Company; Donora Southern Railroad Company; Dover & South Bound Railroad Company; The Due West Railway Company; The Duluth & Iron Range Railroad Company; Duluth & Northeastern Railroad Company; The Duluth & Northern Minnesota Railway Company; Duluth, Missabe & Northern Railway Company; The Duluth, South Shore & Atlantic Railway Company; Duluth, Winnipeg & Pacific Railway Company; Durham & South Carolina Railroad Company; Durham & Southern Railway Company;

East & West Coast Railway; East Carolina Railway; East Jersey Railroad & Terminal Company; The East Jordan & Southern Railroad Company; The East St. Louis Connecting Railway Company; East Tennessee & Western North Carolina Railroad Company; Eastern

Kentucky Railway Company and Sturgis G. Bates, receiver; Eastern Texas Railroad Company; Edgemoor & Manetta Railway Company; El Paso & Southwestern Company; El Dorado & Wesson Railway Company; Elberton & Eastern Railroad Company; Elgin, Joilet & Eastern Railway Company; Elkin & Allegheny Railway Company and C. B. Penney and M. W. Thompson, receivers; The Elwood, Anderson & Lapelle Railroad Company; Emmittsburg Railroad Company; Empire & Southeastern Railroad; Ensley Southern Railway Company; Erie Railroad Company; Escambia Land and Manufacturing Company's Logging Railroad; Escambia Railway; Escanaba & Lake Superior Railroad Company; Etna & Montrose Railroad Company; Evansville & Indianapolis Railroad and W. P. Kappes, receiver; Evansville, Suburban & Newburgh Railway Company;

Fairchild & Northeastern Railway; The Fairport, Painesville & Eastern Railroad Company; Felicity & Bethel Railroad Company; Fellsmere Railroad; Ferdinand Railroad Company; Fernwood & Gulf Railroad Company; Flint River & Northeastern Railroad Company; Florida, Alabama & Gulf Railroad Company and Hal. L. Scott, receiver; Florida East Coast Railway Company; Fredericksburg & Northern Railway Company; Fonda, Johnstown & Gloversville Railroad Company; Fordyce & Princeton Railroad Company; Fore River Railroad Corporation; Fort Dodge, Des Moines & Southern Railroad Company; Fort Smith & Western Railroad Company and Arthur L. Mills, receiver; The Fort Smith, Poteau & Western Railroad Company; Fort Smith, Subiaco & Eastern Railroad Company; Fort Wayne, Cincinnati & Louisville Railroad Company; Fort Worth & Rio Grande Railway Company; Fort Worth Belt Railway Company; Fourche River Valley & Indian Territory Railway Company; Frankfort & Cincinnati Railway Company; The Franklin & Abbeville Railway Company; Fulton Chain Railway Company;

Gainesville & Northwestern Railroad Company; Gainesville Midland Railway; Galesburg & Great Eastern Railroad Company; The Galveston, Harrisburg & San Antonio Railway Company; Galveston, Houston & Henderson Railroad Company; Garyville Northern Railroad Company; Genesee & Wyoming Railroad Company; The Garden City Western Railway Company; Georgia & Florida Railway and W. R. Sullivan, J. F. Lewis, and L. M. Williams, receivers; Georgia Coast & Piedmont Railroad Company and F. D. Aiken and C. H. Leavy, receivers; The Georgia, Florida & Alabama Railway Company; Georgia Northern Railway Company; Georgia Railroad; Georgia Southern & Florida Railway Company; Georgia Southwestern & Gulf Railroad Company; The Gettysburg & Harrisburg Railway Company; Gideon & North Island Railroad Company; Glenfield & Western Railroad Company; Goodrich Transit Company; Gould Southwestern Railway and W. H. Roberts, receiver; Grafton & Upton Railroad Company; Grand Rapids & Indiana Railway Company; Grand Trunk Pacific Railway Company; Grand Trunk Railway Company of Canada; Grand Trunk

Western Railway Company; The Great Northern Railway Company; Green Bay & Western Railroad Company; Greene County Railroad Company; Greenville & Western Railroad Company; Greenwich & Johnsonville Railway Company; Groveton, Lufkin & Northern Railway Company; The Gulf & Sabine River Railroad Company; Gulf & Ship Island Railroad Company; Gulf, Colorado & Santa Fe Railway Company; Gulf, Florida & Alabama Railway Company and J. T. Steele, receiver; Gulf, Mobile & Northern Railroad Company; Gulf, Texas & Western Railway Company;

The Hagerstown & Frederick Railway Company; Hampton & Branchville Railroad and Lumber Company; Hannibal Connecting Railroad Company; The Hanover Railway Company; Hardwick & Woodbury Railroad Company; Harriman & Northeastern Railroad Company; Hartford & New York Transportation Company; Hartwell Railway Company; Hawkinsville & Florida Southern Railway Company; Helena, Parkin & Northern Railway Company; Hickory Valley Railroad Company; High Point, Randleman, Asheboro & Southern Railroad Company; Hillsboro & Northeastern Railway Company; Hoboken Manufacturers' Railroad Company; The Hocking Valley Railway Company; Hoosac Tunnel & Wilmington Railroad Company; Houston & Brazos Valley Railway Company and Geo. C. Morris, receiver; Houston & Shreveport Railroad Company; Houston & Texas Central Railroad Company; Houston Belt & Terminal Railway Company; The Houston East & West Texas Railway Company; The Huntington & Broadtop Mountain Railroads & Coal Company;

Iberia & Vermillion Railroad Company; Iberia, St. Mary & Eastern Railroad Company; Illinois Central Railroad Company; Illinois Midland Railway; Illinois Northern Railway; The Illinois Southern Railway Company and W. H. Wheelock, receiver; Illinois Terminal Railroad Company; Illinois Traction System; Indiana Harbor Belt Railroad Company; Indiana Northern Railway Company; The Indianapolis & Louisville Traction Railway Company; Intercolonial Railway of Canada; International & Great Northern Railway Company and James A. Baker, receiver; International Bridge Company; Interstate Car Transfer Company; The Interstate Railroad Company; Inter-Urban Railway Company; Inverness Railway & Coal Company; Iowa Southern Utilities Company; Ironton Railroad Company;

Jacksonville Terminal Company; Jamestown, Westfield & Northwestern Railroad Company; Jefferson & Northwestern Railway Company; Johnstown & Stony Creek Railroad Company; Jonesboro, Lake City & Eastern Railroad Company;

Kalamazoo, Lake Shore & Chicago Railway Company; The Kanawha & Michigan Railway Company; Kanawha & West Virginia Railroad Company; Kanawha Central Railway Company; Kanawha, Glen Jean & Eastern Railroad Company; Kane & Elk Railroad Company; Kansas City, Clay County & St. Joseph Railway Company; The Kansas City, Clinton & Springfield Railway Company; The Kansas City, Mexico & Orient Railroad Company and Wm. T. Kemper, receiver; Kansas City, Mexico & Orient Railway Com-

pany of Texas; Kansas City Northwestern Railroad and L. S. Cass, receiver; The Kansas City Southern Railway Company; Kansas City Terminal Railway Company; Keeseville, Ausable Chasm & Lake Champlain Railroad Company; Kentucky & Indiana Terminal Railroad Company; Kentucky & Tennessee Railway; Kentucky Midland Railroad Company; Kentwood & Eastern Railroad Company; Kentwood & Eastern Railway Company; Kentwood, Greensburg & Southwestern Railroad Company; Keokuk & Des Moines Railway Company; Kewaunee, Green Bay & Western Railroad Company; Knox Railroad Company; The Kinston-Carolina Railroad Company; Kishacoquillas Valley Railroad Company; Knoxville, Sevierville & Eastern Railway Company; Kosciusko & Southeastern Railroad Company;

La Crosse & Southeastern Railway Company; Lackawanna & Wyoming Valley Railroad Company; Lake Champlain & Moriah Railroad Company; Lake Charles & Northern Railroad Company; Lake Charles Railway & Navigation Company; The Lake Erie & Western Railroad Company; Lake Providence, Texarkana & Western Railroad Company; Lake Superior & Ishpeming Railway Company; Lake Superior Terminal & Transfer Railway Company; The Lake Terminal Railroad Company; The Lakeside & Marblehead Railroad Company; Lancaster & Chester Railway Company; L'Anguille River Railway Company; Laona & Northern Railway Company; La Salle & Bureau County Railroad Company; Laurel Park Railway Company; Laurinburg & Southern Railroad Company; Lawrenceville Branch Railroad Company; Leavenworth & Topeka Railroad Company; The Leavenworth Terminal Railway & Bridge Company; Leetonia Railway Company; The Lehigh & Hudson River Railway Company; Lehigh & New England Railroad Company; Lehigh Valley Railroad Company; The Lehigh Valley Railway Company; Lehigh Valley Railroad Company of New Jersey; Liberty-White Railroad; Ligonier Valley Railroad Company; Litchfield & Madison Railway Company; Little Kanawha Railroad Company; Little River Railroad Company (of Tennessee); Little Rock, Maumelle & Western Railroad Company; Live Oak, Perry & Gulf Railroad Company; The Long Island Railroad Company; The Lorain & West Virginia Railway Company; The Lorain, Ashland & Southern Railroad Company; Louisiana & Arkansas Railway Company; The Louisiana & North West Railroad Company and Geo. W. Hunter, receiver; Louisiana & Pacific Railway Company; Louisiana & Pine Bluff Railway Company; Louisiana Railway & Navigation Company; Louisiana Southern Railway Company; Louisiana Western Railroad Company; Louisiana & Jeffersonville Bridge & Railroad Company; Louisville & Nashville Railroad Company; Louisville & Northern Railway & Lighting Company; Louisville & Wadley Railroad Company; Louisville Bridge & Terminal Railroad; Louisville, Henderson & St. Louis Railway Company; Louisville, New Albany & Corydon Railroad Company; The Lowville & Beaver River Railroad Company; Ludington & Northern Railroad Company;

McKeesport Connecting Railroad Company; The McKeesport Terminal Railroad Company; Mackinac Transportation Company; Macon & Birmingham Railway Company and H. W. Miller, receiver; Macon, Dublin & Savannah Railroad Company; Madison Southern Railway Company; Maine Central Railroad Company; Maine Coast Company; Mammoth Cave Railroad Company; Manchester & Oneida Railway Company; Manila & Southwestern Railway Company; Manistee & Northeastern Railroad and The Michigan Trust Company, receiver; Manistee & Repton Railroad; Manistique & Lake Superior Railroad Company; Mansfield Railway & Transportation Company; Manufacturers Railway Company of St. Louis; Manufacturers' Junction Railway Company; Marcellus & Otisco Lake Railway Company; Marinette, Tomahawk & Western Railroad Company; Marion & Eastern Railroad Company; Marion & Rye Valley Railway Company; Marion Railway Corporation; Maryland & Pennsylvania Railroad Company; Maryland, Delaware & Virginia Railway Company; The Maryland Electric Railways Company; Mason City & Clear Lake Railroad Company; Massena Terminal Railroad Company; Maxton, Alma & Southbound Railroad Company of Alma, N. C.; Memphis, Dallas & Gulf Railroad Company; Mercer Valley Railroad Company; Meridian & Memphis Valley Railway Company; Miami Mineral Belt Railroad Company; The Michigan Central Railroad Company; Michigan Railway Company; Middle Tennessee Railroad Company; Middleburgh & Schoharie Railroad Company; Middletown & Unionville Railroad Company; Midland Railway Company; Midland Valley Railroad Company; Mineral Point & Northern Railway Company; Mineral Range Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis Eastern Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Minneapolis Western Railway Company; Minnesota & International Railway Company; Minneapolis, Northfield & Southern Railway; Minnesota Transfer Railway Company; Mississippi & Western Railroad Company; Mississippi Central Railroad Company; Mississippi Eastern Railway Company; Mississippi River & Bonne Terre Railway; Missouri & Illinois Bridge & Belt Railroad Company; Missouri & North Arkansas Railroad Company and Festus J. Wade, receiver; Missouri, Kansas & Texas Railway Company and C. E. Schaff, receiver; The Missouri, Kansas & Texas Railway Company of Texas and C. E. Schaff, receiver; Missouri, Oklahoma & Gulf Railway Company and Alexander New and Henry C. Ferris, receivers; Missouri, Oklahoma & Gulf Railway Company of Texas; Missouri Pacific Railroad Company; Mobile & Ohio Railroad Company; The Monongahela Connecting Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Montpelier & Wells River Railroad; Morehead & North Fork Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Morgantown & Kingwood Railroad Company; Morristown & Erie Railroad Company; Moshassuck Valley Railroad Company; Mount Hope Mineral Railroad Company; Mount Jewett, Kinzua & Riterville Railroad Company;

Muncie & Western Railroad Company; Muscatine, Burlington & Southern Railroad Company;

The Nacogdoches & Southeastern Railroad Company; Napierville Junction Railway Company; Nashville, Chattanooga & St. Louis Railway; Natchez & Southern Railway Company; Natchez, Columbia & Mobile Railroad Company; Natchez, Urania & Ruston Railway Company; Neame, Carson & Southern Railroad Company; Nelson & Albemarle Railway Company; New Haven & Dunbar Railroad Company; New Iberia & Northern Railroad Company; New Orleans & Lower Coast Railroad Company; New Orleans & Northeastern Railroad Company; New Orleans Great Northern Railroad Company; New Orleans, Natalbany & Natchez Railway Company; New Orleans, Texas & Mexico Railway Company; New River, Holston & Western Railroad Company; The New York & Long Branch Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York Dock Company's Terminal Railway; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Philadelphia & Norfolk Railroad Company; New York, Susquehanna & Western Railroad Company; New York, Westchester & Boston Railway Company; Niagara Junction Railway Company; Norfolk & Portsmouth Belt Line Railroad Company; Norfolk & Western Railway Company; Norfolk Southern Railroad Company; Northampton & Bath Railroad Company; Northern Alabama Railway Company; Northern Liberties Railway Company; The Northern Ohio Railway Company; North Louisiana & Gulf Railroad Company; Northwestern Pennsylvania Railway Company; Norton & Northern Railway; Norwood & St. Lawrence Railroad Company;

Ohio & Kentucky Railway Company; Ohio Electric Railway Company; Oklahoma, Kansas & Missouri Railway Company; Okmulgee Northern Railway Company; Ontonagon Railroad Company; The Orange & Northwestern Railroad Company; Ouachita Valley Railway Company;

Paris & Great Northern Railroad Company; Paris & Mount Pleasant Railroad Company; Pelham & Havana Railroad Company; Pencoyd & Philadelphia Railroad Company; Pennsylvania Company; The Pennsylvania Railroad Company; Pensacola, Alabama & Tennessee Railroad Company; The Pennsylvania Railroad Company (Western Lines); People's Railway Company; Peoria & Pekin Union Railway Company; Peoria Railway Terminal Company; Pere Marquette Railway Company; Perkiomen Railroad Company; Philadelphia & Reading Railway Company; The Philadelphia, Newtown & New York Railroad Company; Pierre, Rapid City & Northwestern Railway Company; The Pittsburgh & Lake Erie Railroad Company; the Pittsburgh & Shawmut Railroad Company; Pittsburgh & Susquehanna Railroad Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Allegheny & McKees Rocks Railroad Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The Pittsburgh, Lisbon &

Western Railroad Company; The Pittsburgh, Shawmut & Northern Railroad Company and F. S. Smith, receiver; Pontiac, Oxford & Northern Railroad Company; Port Huron Southern Railroad Company; Potato Creek Railroad Company; The Poteau Valley Railroad Company; The Potomac, Fredericksburg & Piedmont Railroad Company; Prescott & Northwestern Railroad Company; Preston Railroad Company; Pullman Railroad Company;

Quebec Central Railway Company; The Quebec, Montreal & Southern Railroad Company; Quincy, Omaha & Kansas City Railroad Company; Quincy Railroad Company;

Rahway Valley Railroad Company; Raleigh & Charleston Railroad Company; Randolph & Cumberland Railway Company; Rapid City, Black Hills & Western Railroad Company; Rapid Railroad Company; The Rapid Railway Company; Raquette Lake Railway Company; Raritan River Railroad Company; Red River & Gulf Railroad Company; Reynoldsville & Falls Creek Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; Roaring Fork Railroad Company; Robey & Northern Railroad Company; Rockingham Railroad Company; Rock Island Southern Railway; Rockport, Langdon & Northern Railway Company; Rome & Northern Railroad Company and D. B. Carson, receiver; Roscoe, Snyder & Pacific Railway Company; Roswell Railroad Company; Rural Valley Railroad; Rutland Railroad Company;

St. Clair Terminal Railroad Company; St. John River Terminal Company; St. Johnsbury & Lake Champlain Railroad Company; The St. Joseph & Grand Island Railway Company; St. Joseph Terminal Railroad Company; St. Louis & Hannibal Railroad Company; St. Louis & O'Fallon Railway Company; St. Louis-San Francisco Railway Company; The St. Louis, Brownsville & Mexico Railway Company; St. Louis, El Reno & Western Railway Company and Arthur L. Mills, receiver; St. Louis, Kennett & Southeastern Railroad Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis, San Francisco & Texas Railway Company; St. Louis Southwestern Railway Company; St. Louis Transfer Railway Company; The St. Louis, Troy & Eastern Railroad Company; Salem, Winona & Southern Railroad Company; Salisbury & Albert Railway; San Antonio & Aransas Pass Railway Company; Sandersville Railroad Company; Sand Springs Railway Company; The Santa Fe, Raton & Eastern Railroad Company; Sapulpa & Oil Field Railroad; Sardis & Delta Railroad Company; Savannah & Atlanta Railway; The Savannah & Southern Railway Company; Savannah & Statesboro Railway Company; Schoharie Valley Railway Company; Seaboard Air Line Railway Company; Sewell Valley Railroad Company; The Sharpsville Railroad Company and G. M. McIlvain, receiver; Sheffield & Tionesta Railway Company; Shelby County Railway Company; Shreveport, Houston & Gulf Railroad Company; The Sibley, Lake Bisteneau & Southern Railway Company; Sievern & Knoxville Railroad Company; Sioux City Terminal Railway Company; Skaneateles Railroad Company; Skinner Car Ferry Company; Sligo & Eastern Railroad Company; Smoky Mountain Railway Company; South Brooklyn Railway Company; The South Buffalo Railway Com-

pany; Southern New York Power & Railway Corporation; Southern Pacific Railroad Company; Southern Railway & Navigation Company; Southern Railway Company; Southern Railway Company in Mississippi; South Georgia Railway Company; South Manchester Railroad Company; Stanley, Merrill & Phillips Railway Company; The Staten Island Rapid Transit Railway Company; Statenville Railway Company; Sterling Mountain Railway Company; Stewartstown Railroad Company; Stony Creek Railroad Company; Strasburg Railroad Company; Strouds Creek & Muddlety Railroad Company; Sugar Land Railway Company; Sumter & Choctaw Railway Company; Surry, Sussex & Southampton Railway Company; Susquehanna & New York Railroad Company; Susquehanna River & Western Railroad Company; Sylvania Central Railway Company;

Tabor & Northern Railway Company; Talbotton Railroad Company; Tallulah Falls Railway Company; Tama & Toledo Railway Company; Tampa & Gulf Coast Railroad Company; Tampa & Jacksonville Railway Company; Tampa Northern Railroad Company; Tavares & Gulf Railroad; Tennessee & North Carolina Railroad Company and Jas. G. Campbell, receiver; Tennessee, Alabama & Georgia Railroad Company; Tennessee Central Railroad Company and W. K. McAlister, receiver; Tennessee, Kentucky & Northern Railroad Company; Tennessee Railway Company and J. N. Baker, trustee; Terminal Railroad Association of St. Louis; Texarkana & Fort Smith Railway Company; Texas & New Orleans Railroad Company; The Texas & Pacific Railway Company and Pearl Wight, receiver; Texas, Arkansas & Louisiana Railway; Texas City Terminal Company; Texas Midland Railroad; Texas, Oklahoma & Eastern Railroad Company; Texas Short Line Railway Company; Texas Southeastern Railroad Company; Texas State Railroad; The Timpson & Henderson Railway Company; Tioga & Southeastern Railway Company; Tionesta Valley Railway Company; The Toledo & Ohio Central Railway Company; Toledo & Western Railroad Company; Townsville Railroad Company; The Toledo, Angola & Western Railway Company; Toledo, Peoria & Western Railway Company and E. N. Armstrong, receiver; Toledo, Saginaw & Muskegon Railway Company; Toledo, St. Louis & Western Railroad Company and W. L. Ross, receiver; The Toledo Terminal Railroad Company; The Toronto, Hamilton & Buffalo Railway Company; Transcontinental Railway; Trans-Mississippi Terminal Railroad Company; Tremont & Gulf Railway Company; The Trinity & Brazos Valley Railway Company and J. W. Robins, receiver; Trinity Valley & Northern Railway Company; Trinity Valley Southern Railroad Company; The Troy Union Railroad Company; The Tuckerton Railroad Company; Tug River & Kentucky Railroad Company; Tuscarora Valley Railroad Company; Tuskegee Railroad Company; The Ulster & Delaware Railroad Company; Unadilla Valley Railway Company; Union & Glenn Springs Railroad Company; Union Freight Railroad Company; Union Pacific Railroad Company; Union Point & White Plains Railroad Company; Union Railway Company (Memphis); Ursina & North Fork Railway Company;

Valdosta, Moultrie & Western Railway Company; Valley River Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Virginia & Carolina Southern Railroad Company; Virginia-Carolina Railway Company; Virginia, Carolina & Southern Railway Company; The Virginian Railway Company;

Wabash Railway Company; The Wabash, Chester & Western Railroad Company and J. Fred Gilster, receiver; Wadley, Southern Railway Company; Warren & Ouachita Valley Railway Company; Warren, Johnsville & Saline River Railroad Company; Warrenton Railroad Company; Washington & Choctaw Railway Company; Washington & Old Dominion Railway; Washington & Vandemere Railroad Company; Washington, Baltimore & Annapolis Electric Railroad Company; Washington Run Railroad Company; Washington Southern Railway Company; The Washington Terminal Company; Washington-Virginia Railway Company; Waterloo, Cedar Falls & Northern Railway Company; Watertown & Sioux Falls Railway Company; Waupaca, Green Bay Railroad Company; Waycross & Southern Railroad Company; Waycross & Western Railroad Company; Waynesburg & Washington Railroad Company; The Weatherford, Mineral Wells & Northwestern Railway Company; Wellington & Powellsville Railroad Company; West Jersey & Seashore Railroad Company; West Shore Railroad Company (The New York Central Railroad Company, lessee); West Side Belt Railroad Company; West Virginia & Southern Railroad Company; The West Virginia Midland Railroad Company; West Virginia Northern Railroad Company; Western & Atlantic Railroad Company; Western Maryland Railway Company; Western New York & Pennsylvania Railway Company; The Western Railway of Alabama; Wharton & Northern Railroad Company; The Wheeling & Lake Erie Railway Company; Wheeling Terminal Railway Company; White River Railroad Company; The Wichita Falls & Northwestern Railway and C. E. Schaff, receiver; Wiggins Ferry Company; Wilkes-Barre & Eastern Railroad Company; Wilkes-Barre & Hazelton Railway Company; The Willams Valley Railroad Company; Williamson & Pond Creek Railroad Company; Williamsport & North Branch Railroad Company and Edw. Bailey, receiver; The Winfield Railroad Company; Winifrede Railroad Company; Winnsboro Granite Corporation's Railroad; Winston-Salem Southbound Railway Company; Wiscasset, Waterville & Farmington Railway Company; Wisconsin & Michigan Railroad Company; Wisconsin & Northern Railroad Company; Wood River Branch Railroad Company; Woodstock Railway Company; Woodward Iron Company's Railroad; Woodworth & Louisiana Central Railway Company; Wrightsville & Tennille Railroad Company; Wyandotte Terminal Railroad Company;

Yadkin Railway Company; The Yazoo & Mississippi Valley Railroad Company; York Harbor & Beach Railroad Company; The Youngstown & Ohio River Railroad Company; The Zanesville & Western Railway Company; and Zwolle & Eastern Railway Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

And it appearing, That the Commission has found in said report that the above-named defendants, in so far as they respectively participate in tariffs carrying joint rates applying through Louisville, Ky., on lumber and forest products from points in the states south of the Ohio and Potomac rivers and east of the Mississippi River or points in the states of Louisiana, Texas, Arkansas, Missouri, and Oklahoma to points north of the Ohio River, to points in the states of Virginia and West Virginia, or to points in western trunk line and trans-Missouri territories, and permitting in connection with such joint rates transit at Buffalo, N. Y., Toledo, Ohio, Grand Rapids, Mich., Fort Wayne and Logansport, Ind., Chattanooga, Tenn., or Meridian, Miss., while contemporaneously denying similar transit arrangements at Louisville, Ky., on the same through routes, subject to complainants to undue prejudice;

It further appearing, That the Commission has found in said report that said defendants except St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, and Missouri Pacific Railroad Company, in so far as they respectively participate in tariffs carrying joint rates applying through Memphis, Tenn., on lumber and forest products from the territories of origin to the territories of destination described in the next preceding paragraph hereof, and permitting in connection with such joint rates transit at Buffalo, N. Y., Toledo, Ohio, Grand Rapids, Mich., Fort Wayne and Logansport, Ind., Chattanooga, Tenn., and Meridian, Miss., while contemporaneously denying similar transit arrangements at Memphis, Tenn., on the same through routes, subject complainants to undue prejudice:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1921, and thereafter to abstain, from the undue prejudice found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 20, 1921, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

28 EXHIBIT C (Here Follows).

EXHIBIT D (Here Follows).

29 EXHIBIT E.

Order.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 18th Day of June, A. D. 1921.

No. 10582.

AMERICAN CREOSOTING COMPANY

v.

JOHN BARTON PAYNE, Director General of Railroads; THE CENTRAL Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, Richmond, Fredericksburgh & Potomac Railroad Company, Washington Southern Railway Company, Western Maryland Railway Company, Erie Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company (the New York Central Railroad Company, Lessee), The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, Buffalo & Susquehanna Railroad Corporation, and New York, Ontario & Western Railway Company.

It appearing, That on March 15, 1921, the Commission made its report and entered its order in the above entitled proceeding; that petition for modification thereof has been duly filed, and good cause appearing therefor;

30 It is ordered, That the second paragraph of the aforesaid order of March 15, 1921, be, and it is hereby, amended to read as follows:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 20, 1921, upon notice to this Commission and to the General public by not less than 10 days'

filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

It is further ordered, That in all other respects the aforesaid order of March 15, 1921, shall remain in full force and effect.

By the Commission.

GEORGE B. McGINTY,
Secretary.

[SEAL.]

31 In the District Court of the United States for the District of New Jersey, June Term, 1921.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company, The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

Notice.

SIRS:

You will please take notice that, upon the petition filed herein on the 27th day of June, 1921, verified the 25th date of June, 1921, with copy of which paper you have this day been served by a United States Marshal, an application will be made to this Court appointed to be held at the United States District Court Room in the General Post Office Building in the City of Trenton, County of Mercer and State of New Jersey on the second day of July, 1921, at ten
32 o'clock in the forenoon of that day (Daylight Saving Time), or as soon thereafter as counsel can be heard, for an order herein suspending the enforcement of an order of the Interstate Commerce Commission dated March 15, 1921, as amended June 18th,

1921, in I. C. C. Docket No. 10582, entitled "American Creosoting Company against Director General, et al.," and enjoining and restraining any and all proceedings thereunder pending the hearing and determination of this cause, and for such other and further relief in the premises as may be just and as the circumstances of the case may require.

Dated, Jersey City, New Jersey, June 27th, 1921.

Respectfully yours,

A. H. ELDER,
Of Counsel for Petitioners.

Room 33, Terminal Station, The Central Railroad Company of New Jersey, Jersey City, N. J.

To the Attorney General of the United States, George B. McGinty, Esq., Secretary, Interstate Commerce Commission, Washington, D. C.

Receipt of service of the above notice acknowledged at Washington, D. C., this 27th day of June, 1921.

INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL,
Chief Counsel.

Service acknowledged by copy as of June 27th, 1921.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

33 (Endorsed:) In the District Court of the United States for the District of New Jersey. The Central Railroad Company of New Jersey; The Pennsylvania Railroad Company; The Baltimore & Ohio Railroad Company; The Chesapeake & Ohio Railway Company; Norfolk & Western Railway Company; The Richmond, Fredericksburg & Potomac Railroad Company; Washington Southern Railway Company; Erie Railroad Company; Western Maryland Railway Company; The Delaware, Lackawanna & Western Railroad Company; Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; The New York Central Railroad Company; The Philadelphia & Reading Railway Company; The New York, New Haven & Hartford Railroad Company; Boston, & Maine Railroad and J. H. Hustis, Temporary Receiver, Maine Central Railroad Company; The Delaware & Hudson Company; Boston & Albany Railroad Company; The Long Island Railroad Company; Central Vermont Railway Co.; Rutland Railroad Company and Buffalo & Susquehanna Railroad Corporation, Petitioners, against United States of America, Respondent. In Equity. June Term, 1921. No. 3075. Notice. Charles E. Miller, Alexander H. Elder, Solicitor and of Counsel for Petitioners, Room 33, Terminal Station, The Central Railroad Company of New Jersey, Jersey City, N. J. Filed Jul. 7, 1921 at 11 o'clock A. M. George T. Cranmer, Clerk.

34 United States District Court, District of New Jersey, June Term, 1921.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA Railroad Company, The Baltimore & Ohio Railroad Company, and Twenty Other Railroad Companies, Petitioners,

against

UNITED STATES OF AMERICA, Respondent.

Motion of the United States to Dismiss the Petition.

United States of America, respondent, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown——

1. The Petition, with the exhibits attacked thereto and made a part thereof, is without equity on its face, and does not state any cause of action against the respondent, and the court may not grant the relief prayed or any part of the same.

2. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the issues made by the parties, and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

35 3. It appears from the petition and the exhibit attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the Acts to Regulate Commerce and the Transportation Act, 1920, and that it was regularly made and entered by the Commission in a proceeding properly pending and conducted.

4. The petitioners have not in and by the petition shown that in making the order the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the petitioners protected by the Constitution of the United States or any other right of petitioners over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the petition, more fully to be pointed out on the hearing hereof,

respondent prays that its motion be sustained, and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
ELMER H. GERAN,
United States Attorney.

[Endorsed:] United States District Court, District of New Jersey. The Central Railroad Company of New Jersey, et al. vs. United States of America. Motion of the United States to dismiss petition. Filed July 2 ,1921, at 10:20 A. M. George T. Cranmer, Clerk.

36 In the District Court of the United States for the District of New Jersey, June Term, 1921.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company, The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent, and INTERSTATE COMMERCE COMMISSION, Intervening Resepondent.

Answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, intervening respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

This respondent, which for convenience will be referred to hereinafter as the Commission, admits that the allegations contained in paragraph I of the petition are true.

37 II.

For the purposes of this cause the Commission admits that the allegations contained in paragraph II of the petition are true but in this connection refers to paragraphs I and II of "Exhibit A", attached to the petition, for particulars.

III.

The Commission admits that a complaint of the American Creosoting Company was filed as docket No. 10582 before the Commission on April 18, 1919, and that said complaint so filed is, except as hereinafter specified, substantially as reproduced in "Exhibit A", attached to the petition now before this court. The Commission alleges that paragraph IV of said "Exhibit A" omits the words "Wheeling, W. Va., Roanoke, Va., Charleston, Va.," which occur after the words "Richmond, Va." in the corresponding paragraph of the complaint filed with the Commission, of which said "Exhibit A" purports to be a copy.

IV.

Answering paragraph IV of the petition, the Commission alleges that each of the allegations contained therein is either a conclusion of law or argumentative, and the Commission therefore neither admits nor denies any of said allegations.

V.

The Commission admits that Walker D. Hines, Director General of Railroads, filed an answer to said complaint of the American Creosoting Company answering for himself and on behalf of all the defendants in said No. 10582 under Federal control, which answer is attached to the petition herein marked "Exhibit B", but refers to said "Exhibit B" for the terms thereof.

VI.

The Commission admits that the allegations contained in paragraph VI of the petition are true, and alleges that in addition to the oral testimony taken, many voluminous exhibits were put in evidence.

38 VII.

The Commission admits that the allegations contained in paragraph VII of the petition are true, except that it alleges that the

paragraph purporting to be quoted from the report proposed by W. N. Brown, Examiner, is incorrect, and that the same should be as follows:

The Commission should find that defendants, in so far as they participate in through rates on creosoted lumber, piling, telegraph cross arms, railroad ties and wooden paving blocks, from points in southern classification territory applying through Newark to points in eastern New York and in New England, on the basis of which through rates, plus a transit charge, creosoting in transit is permitted at Madison, Indianapolis, Bloomington, Toledo or Simpson, while a like transit arrangement is contemporaneously denied at Newark, subject complainant to undue prejudice and disadvantage.

VIII.

The Commission admits that the allegations contained in paragraphs VIII, IX, X, XI and XII of the petition are substantially true, but for the language of the reports and orders in said American Creosoting Co. v. Director General, 61 I. C. C., 145, and said Southern Hardwood Traffic Asso. v. Director General, 61 I. C. C., 132, the Commission refers to exhibits "C", "D" and "E" attached to the petition.

IX.

The Commission alleges that the findings made in said report and order of March 15, 1921, as amended on June 18, 1921, were, and are, and that each of them was, and is, fully supported and justified by the record before the Commission in that proceeding.

The Commission further alleges that in making said report, findings and order it considered and weighed carefully in the light of its own knowledge and experience every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by allegations in the petition in this suit.

39 The Commission further alleges that said report, findings and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making them it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and that the Commission denies each of, and all, the allegations to the contrary contained in said petition.

X.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition herein, in so far as they conflict either with allegations in this answer, or with either the statements or conclusions of fact included in the Commission's said report and orders, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove, as this honorable court shall direct, and therefore prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL,
Of Counsel.

40 CITY OF WASHINGTON,
District of Columbia, ss:

Winthrop M. Daniels, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named intervening respondent, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

WINTHROP M. DANIELS.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 30th day of June, 1921.

[SEAL.] ALFRED HOLMEAD,
Notary Public.

(Endorsed:) In the District Court of the United States, for the District of New Jersey. The Central Railroad Company of New Jersey et al., Petitioners, v. United States of America, Respondent, and Interstate Commerce Commission, Intervening Respondent. In Equity. No. 3075. June Term, 1921. Answer of Interstate Commerce Commission. Walter McFarland, Counsel for Interstate Commerce Commission, Washington, D. C., P. J. Farrell, of Counsel. Filed July 2, 1921, at 10:20 A. M., George T. Cranmer, Clerk.

41 United States District Court, District of New Jersey.

In Equity.

No. 3075.

CENTRAL RAILROAD COMPANY OF NEW JERSEY et al.

vs.

UNITED STATES and INTERSTATE COMMERCE COMMISSION.

Order.

This cause came on to be heard and was argued by counsel, and thereupon it was Ordered, Adjudged and Decreed as follows, viz:

1. That the application for preliminary injunction made by the petitioners, be and the same is hereby denied (to which ruling and order the petitioners except).

2. That the motion of the United States to dismiss the petition be and the same is hereby denied (to which ruling and order the United States excepts).

By the Court:

J. WARREN DAVIS,
Circuit Judge.
JOHN RELLSTAB,
JOSEPH L. BODINE,
District Judges.

July 2, 1921.

(Endorsed:) United States District Court, District of New Jersey. Central Railroad Co. of N. J. et al. vs. United States of America et al. Order denying motion for Preliminary Injunction and Motion to Dismiss. Filed Jul- 2, 1921, at 11 o'clock A. M. George T. Cranmer, Clerk.

42 In the District Court of the United States for the District of New Jersey, June Term, 1921.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, The Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, Boston & Albany Railroad Company, The Long Island Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo, Susquehanna Railroad Corporation, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent, and INTERSTATE COMMERCE COMMISSION, Intervening Respondents.

Assignment of Errors.

Filed as of July 2, 1921.

The above-named petitioners now come by their Solicitor and Counsel and in connection with their petition for appeal, file the following assignment of errors on which they will rely on said ap-

peal to the Supreme Court of the United States from the order of the District Court entered July 2, 1921, denying the petition for an interlocutory or preliminary injunction in the above-entitled cause.

The District Court erred:

43 I.

In denying the motion of the above-named petitioners for an interlocutory injunction pendente lite restraining the order of the Interstate Commerce Commission described in the petition for an injunction, for the reasons set forth in said petition.

II.

In not granting the application of the above-named petitioners for an interlocutory injunction pendente lite restraining the order of the Interstate Commerce Commission described in the above-entitled cause.

III.

In not holding and adjudging that the order of the Interstate Commerce Commission referred to in the petition herein was, as disclosed by the Commission's opinion, unsupported by facts disclosing a violation by the above-named petitioners of the Act to Regulate Commerce.

IV.

In not holding and adjudging that said Interstate Commerce Commission was without lawful authority to make the order complained of in the above-entitled cause.

V.

In not holding and adjudging that said order of the Interstate Commerce Commission complained of in the above-entitled cause deprives your petitioners of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

VI.

44 In not holding and adjudging that, as to the petitioners other than the Pennsylvania Railroad Company and The Central Railroad Company of New Jersey, whose rails do not reach the plant of the American Creosoting Company at Newark, said order of the Interstate Commerce Commission complained of in the above-entitled cause was, as disclosed by the said Commission's opinion, unsupported by facts disclosing a violation of the Act to Regulate Commerce; was unwarranted by said Act, and involved a taking of said petitioners' property without due process of

law, in violation of the Fifth Amendment of the Constitution of the United States.

VII.

In not finding and deciding that, as a matter of law, an interstate common carrier is not chargeable with causing undue prejudice and disadvantage by denying a creosoting in transit privilege at a local point on its line merely because it concurs in joint freight rates applicable through said point in connection with which rates certain other participating carriers at local points on their line accord such creosoting in transit privilege.

Wherefore, The petitioners, and each of them, pray that the said order or decree of the District Court, entered July 2, 1921, denying the application of the petitioners for an interlocutory injunction pendente lite be reversed, annulled and set aside, with directions that the application be granted, and for such other and further order as may be appropriate.

CHARLES E. MILLER,
HENRY WOLF BIKLE,
ALEXANDER H. ELDER,
Solicitors of Counsel for Petitioners.

45 (Endorsed:) In the District Court of the United States for the District of New Jersey—The Central Railroad Company of New Jersey, et al., Petitioners, v. United States of America, Respondent, and Interstate Commerce Commission, Intervening Respondent.—In Equity, No. 3075, June Term, 1921. Assignment of Errors.—Charles E. Miller, Solicitor for Petitioners, Room 33, Terminal Station, The Central Railroad Company of New Jersey, Jersey City, N. J.—Filed as of Jul. 2, 1921, at 11 o'clock A. M.—George T. Cranmer, Clerk.

46 In the District Court of the United States for the District of New Jersey, June Term, 1921.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company; The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, The Long Island Railroad Company, Boston & Albany Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Petitioners-Appellant-,

against

UNITED STATES OF AMERICA, Respondent-Appellee, and the INTERSTATE COMMERCE COMMISSION, Intervening Respondent-Appellee.

Petition for Appeal.

Filed July 2, 1921.

The above-named petitioners conceiving themselves aggrieved by the order entered on July 2, 1921 in the above-entitled proceeding denying said petitioners' application for an interlocutory order or decree restraining an order of the Interstate Commerce Commission dated March 15, 1921, in American Creosoting Company against Director General, et al., I. C. C. Docket No. 10582, do hereby
47 pray an appeal to the Supreme Court of the United States from the said order denying the application for an interlocutory injunction.

The particulars wherein said petitioners consider said order denying an interlocutory injunction erroneous, are set forth in the assignment of errors on file, to which reference is made.

And the said petitioners respectfully represent that if the Supreme Court of the United States should reverse the order of this court above mentioned, great and irreparable injury will in the meantime result to the petitioners, as appears more fully from the record in this cause upon which this court based its decision.

Your petitioners pray that upon such terms as to bond as this court may direct, an order may issue staying and suspending the

enforcement of said order of the Interstate Commerce Commission and restraining and enjoining the respondents or any or either of them from enforcing or attempting to enforce said order until your petitioners will have time to perfect their appeal and present to the Supreme Court of the United States an application for a preliminary suspension order pending the hearing of this appeal.

And the said petitioners pray that a transcript of the record, proceedings and papers on which the said order denying an interlocutory injunction was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

CHARLES E. MILLER,
Solicitor for and of Counsel for Petitioners.

Room 33, terminal station, The Central Railroad Company of New Jersey, Jersey City, N. J.

48 Trenton, N. J., July 2d, 1921.

And now, to wit, on July 2d, A. D., 1921, it is ordered that the appeal be allowed as prayed for.

And it appearing that if the order of this court denying a preliminary injunction be reversed by the Supreme Court of the United States the petitioners in the meantime may be subjected to great and irreparable injury for the reason that the petitioners by the order of the Interstate Commerce Commission, above referred to, will have to either (1) withdraw their concurrences from the existing joint rates under which lumber is transported, which will tend to divert traffic to other routes and to deprive them of revenue to which they are justly entitled, or (2) grant the creosoting in transit privilege at Newark, as required by said order, which will deprive them of the difference between the sum of their local rates applying to and from Newark and the joint rates from point of origin to destination, and will impose great and substantial expense for policing such shipments, and in view of the great difficulty of enforcing the transit tariffs, subject petitioners to the risk of substantial penalties.

It is further ordered that if the petitioners shall within thirty days from the date hereof perfect their appeal to the Supreme Court and also present to that Court within such thirty days a petition for a preliminary suspension of the order of the Interstate Commerce Commission, referred to in the petition for appeal, pending the determination of such appeal, and shall also within five days from the date hereof, in addition to the ordinary appeal bond, make and file in this court a bond of the Central Railroad Co. of New Jersey in the penal sum of One thousand Dollars, payable to the
49 Clerk of this court, with sureties to be approved by him, conditioned that in the event the petitioners shall not within thirty days from the entry hereof perfect their appeal to the Supreme Court and present to that court within such thirty days a petition for a preliminary suspension of the above referred to order of the Interstate Commerce Commission pending such appeal, or in the event the appeal from the decree of this court is dismissed by the

petitioners, or said decree is affirmed by the Supreme Court, they will on demand pay to the parties entitled thereto, all legal damages accruing to them by reason thereof, the said respondents be and they hereby are restrained and enjoined from enforcing or attempting to enforce the order of the Interstate Commerce Commission dated March 15, 1921 in American Creosoting Company against Director General, et al. I. C. C. Docket No. 10852, until such time as the Supreme Court of the United States shall determine said petition for a preliminary suspension of said order.

J. WARREN DAVIS,
Circuit Judge.

JOHN RELLSTAB,
JOSEPH L. BODINE,
District Judges.

(Endorsed:) In the District Court of the United States, for the District of New Jersey. The Central Railroad Company of New Jersey, et al., Petitioners-Appellant, vs. United States of America, Respondent-Appellee and The Interstate Commerce Commission, Intervening Respondent-Appellee. In Equity. Petition for Appeal. Order allowing Appeal—Charles E. Miller, Solicitor for Petitioners, Room 33, Terminal Station, The Central Railroad Company of New Jersey, Jersey City, N. J.—Filed July 2, 1921, at 11 o'clock A. M.—George T. Cranmer, Clerk.

50 In the District Court of the United States for the District of New Jersey.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLvania Railroad Company, The Baltimore & Ohio Railroad Company, The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company, The Richmond, Fredericksburg & Potomac Railroad Company, Washington Southern Railway Company, Erie Railroad Company, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central Railroad Company, Philadelphia & Reading Railway Company, The New York, New Haven & Hartford Railroad Company, Boston & Maine Railroad and J. H. Hustis, Temporary Receiver; Maine Central Railroad Company, The Delaware & Hudson Company, The Long Island Railroad Company, Boston & Albany Railroad Company, Central Vermont Railway Company, Rutland Railroad Company, and Buffalo & Susquehanna Railroad Corporation, Western Maryland Railway Company, The Delaware, Lackawanna & Western Railroad Company, Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA, Respondent-Appellee, and the INTERSTATE COMMERCE COMMISSION, Intervening Respondent-Appellee.

Know all men by these presents that we The Central Railroad Company of New Jersey, a corporation of the State of New Jersey

and United States Fidelity & Guaranty Company, a corporation of the State of Maryland, are held and formally bound unto George T. Cranmer, Clerk of the United States District Court for the District of New Jersey in the sum of One Thousand Dollars ($1,000.00), to be paid to the said George T. Cranmer, for the payment of which well and duly to be made we bind ourselves and each of us,
51 our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the Sixth day of July in the year of our Lord, One thousand Nine hundred and Twenty-one.

Whereas, the above named petitioners are prosecuting an appeal to the Supreme Court of the United States to reverse a decree rendered in the above entitled cause on the 2nd day of July, 1921, and

Whereas, said District Court of the United States for the District of New Jersey has entered an order staying the enforcement of an order of the Interstate Commerce Commission dated March 15, 1921, in American Creosoting Company against Director General, et al., I. C. C. Docket No. 10,582 until such time as the Supreme Court of the United States shall determine a petition for a preliminary suspension of said order of the Interstate Commerce Commission pending the determination of the aforesaid appeal, upon condition that said petitioners shall within five days from the date of said order, in addition to the ordinary appeal bond, make and file in said Court a bond of The Central Railroad Company of New Jersey in the penal sum of One Thousand Dollars ($1,000.00) payable to the Clerk of said Court with sureties to be approved by him, conditioned that in the event the petitioners shall not within thirty days from the entry of said order perfect their aforesaid appeal to the Supreme Court and present to that Court within such thirty days a petition for a preliminary suspension of the above referred-to order of the Interstate Commerce Commission, pending such appeal or in the event that such appeal is dismissed by the petitioners or said decree is affirmed by the Supreme Court they will on demand pay to the parties entitled thereto all legal damages accruing to them by reason of such stay:

52 Now, therefore, the condition of this obligation is such that if the above named petitioners shall within thirty days from the date of the aforesaid order of the United States District Court for the District of New Jersey perfect their appeal to the Supreme Court of the United States and present to that Court within such thirty days a petition for a preliminary suspension of the above referred to order of the Interstate Commerce Commission pending such appeal or in the event that said appeal is dismissed by the petitioners or said decree is affirmed by the Supreme Court of the United States, they shall, on demand, pay to the parties entitled thereto all legal damages accruing to them by reason of such stay of the enforcement of the aforesaid order of the Interstate Commerce Commission then

this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By W. G. BESLER,
President & General Manager.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN B. GEYLER,
Attorney in Fact.

Attest:

[SEAL.] F. T. THICKERSON,
Secr'y.

Attest:

PERCY A. S. ROGERS,
Attorney in Fact.

The within bond approved as to form and sufficiency.
[L. S.] GEORGE T. CRANMER,
Clerk.

53 *Statement United States Fidelity and Guaranty Company, Baltimore, Md., at the Close of Business December* 31, 1920.

Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$7,060,650.00	Government Bonds	$6,767,881.25
5,479,549.72	Baltimore City and other Municipal, State and County Bonds	5,016,429.71
2,297,600.00	Railroad and Equipment Bonds	1,965,302.00
235,000.00	Electric Railway Bonds	176,650.00
3,904,658.22	Public Utility and Miscellaneous Bonds	3,598,555.73
286,215.00	Bank and Trust Company Stocks	146,606.00
168,600.00	Railroad Stocks	680,944.50
458,375.00	Miscellaneous Stocks	358,279.50
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York and other assets	140,000.00
19,990,647.94	Total Bonds and Stocks-Market Values December 31st, 1921	18,850,648.69

Home Office Property appraised by Insurance Department of Maryland	750,000.00
Other Property appraised by Insurance Department of Maryland	54,240.12
Home Office Addition Calvert, Mercer and Water Sts. (Payments on Account)	100,494.23
New York Property, appraised by Insurancec Department of New York	850,000.00
Loans secured by pledge of Collaterals	93,544.92
Loans secured by Mortgages	55,300.00
Cash on Hand and *om* Depositories	3,378,487.34
Premiums in course of Collection, not more than three months due	5,579,406.16
Deposits with Workmen's Compensation Reinsurance Bureau	372,773.74
Interest due and accrued	251,553.20
Due for Subscriptions, Department and Guaranteed Attorneys	88,842.25
Deposits with New York Excise Committee	37,395.21
Other Assets	74,440.61
	30,537,126.47

Liabilities.

Capital Stock paid in cash		$4,500,000.00
Due for Return Premiums and Reinsurance		6,794.14
Funds held under Reinsurance Treaties		34,642.78
Reserve for 1921 Taxes and Expenses in Transit		619,205.49
Commissions accrued on uncollected premiums		1,098,505.45
Premium Reserve Computed in Accordance with Requirements of New York Insurance Department	$10,240,491.90	
Reserve for Claims Admitted and not Admitted, all Department, in accordance with New York Laws	9,705,416.93	
Surplus	4,332,069.78	
		24,277,978.61
		$30,537,126.47

W. GEORGE HYNSON,
Treasurer.

CHAS. O. SCULL,
Vice-President.

54 STATE OF MARYLAND,
City of Baltimore, ss:

On this 17th day of January, 1921, before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, personally appeared Chas. O. Scull and W. George Hynson, Vice-President and Treasurer, respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such Officers of the said Company, and that the above and foregoing is a full, true and correct statement of the Assets and Liabilities of the said Company, as they appeared upon the books of the said Company on the 31st day of December, A. D. 1920.

In witness whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[Notarial Seal.] A. D. PATRICK,
Notary Public.

STATE OF NEW JERSEY,
County of Essex, ss:

On this sixth day of July Nineteen Hundred and twenty-one, before me the subscriber, personally came Percy A. S. Rogers who, being by me duly sworn, on his oath says that he is one of the attorneys-in-fact of the United States Fidelity and Guaranty Company, a corporation of the State of Maryland; that he resides in the City of Newark; that he knows John B. Geyler, the attorney-in-fact of the said United States Fidelity and Guaranty Company, signing the foregoing bond for the said Company; that he knows also the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal and was so affixed by the said attorney-in-fact; that the said instrument was signed by the said attorney-in-fact and attested by deponent as one of the attor-
55 neys-in-fact of said Company; by order of the Board of Trustees of said Company, in deponent's presence, as the voluntary act and deed of said Company; that the said Company has duly complied with all the requirements of Chapter 134 of the laws of the State of New Jersey of the year 1902; that the good and available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said chapter; that the said United States Fidelity and Guaranty Company is duly incorporated under the laws of the State of Maryland and is authorized by the laws of said State and under its charter to become surety on bonds and obligations such as are mentioned in said chapter; that it has on deposit with the Treasurer of the State of Maryland Three Hundred Thousand Dollars in good securities, worth at par value at least that sum, and held for the benefit of the holders of the obligations of said Company; and deponent further says that the said Company has appointed Walter C. Schryver and John B. Geyler, its attorneys-in-fact, in the City of Newark; that said appointment was made by a certain power of attorney, of which the following is a true copy:

Power of Attorney.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Walter C. Schryver and John B. Geyler, of the City of Newark, State of New Jersey, its true and lawful attorneys in and for the State of New Jersey, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any
56 and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever either the said Walter C. Schryver or the said John B. Geyler may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company, has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 21st day of May, A. D. 1914.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

(Sig.) By W. W. SYMINGTON, *Vice-President.*

(Sig.) WM. T. MORGAN,

[SEAL.] *Assistant Secretary.*

STATE OF MARYLAND,
Baltimore City, ss:

On this 21st day of May, A. D. 1914, before me personally came W. W. Symington, Vice-President of the United States Fidelity and Guaranty Company, and Wm. T. Morgan, Assistant Secretary of said Company, with both of whom I am personally acquainted, who, being by me severally sworn, said that they resided in the City of Baltimore, Maryland; that they, the said W. W. Symington and Wm. T. Morgan, were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate
57 seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of said Company.

My Commission expires the first Monday in May, A. D. 1916.

[SEAL.] (Sig.) WILLIAM J. McFEELY, JR.,
Notary Public.

STATE OF MARYLAND,
Baltimore City, sct:

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that William J. McFeely, Jr., Esq., before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgements or proofs of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereunto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 21st day of May, A. D. 1914.

[SEAL.] (Sig.) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

58 *Copy of Resolution.*

That whereas, it is necessary for the effectual transaction of business that this Company appoints agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of New Foundland.

Therefore be it resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or any thing in the nature of either of the same which are or may by law municipal or otherwise, or by any statute of the United States, or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local municipal or otherwise, be allowed, required or permitted to be executed, made, taken given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, offi

interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be
59 provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 21st day of May, A. D. 1914.

[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.
PERCY A. S. ROGERS.

Sworn and subscribed to before me this 6th day of July, A. D. 19—.

WALTER SCHRYVER,
Notary Public of New Jersey.

Endorsed: In the District Court of the United States for the District of New Jersey, The Central Railroad Company of New Jersey, et al., Petitioners-Appellants against United States of America, Respondent-Appellee and the Interstate Commerce Commission intervening Respondent-Appellee, Bond on Application for stay. Filed July 7, 1921. George T. Cranmer, Clerk.

60 United States District Court, District of New Jersey, J
Term, 192-.

In Equity.

No. 3075.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNS
vania Railroad Company, The Baltimore & Ohio Railroad C
pany, The Chesapeake & Ohio Railroad Company, Norfolk
Western Railroad Company, The Richmond, Fredericksburg
Potomac Railroad Company, Washington Southern Railway C
pany, Erie Railroad Company, Western Maryland Railway C
pany, The Delaware, Lackawanna & Western Railroad Compa
Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsbu
Railway Company, The New York Central Railroad Compa
Philadelphia & Reading Railway Company, The New York, N
Haven & Hartford Railroad Company, Boston & Maine Railr
and J. H. Hustis, Temporary Receiver, Maine Central Railr
Company, The Delaware & Hudson Company, The Long Isla
Railroad Company, Boston & Albany Railroad Company, Cent
Vermont Railway Company, Rutland Railroad Company, a
Buffalo & Susquehanna Railroad Corporation, Petitioners-App
lants,

against

UNITED STATES OF AMERICA, Respondent-Appellee, and INTERSTA
COMMERCE COMMISSION, Intervening Respondent-Appellee.

Præcipe for Appeal Record.

Filed July —, 1921.

To Hon. Geo. T. Cranmer, Clerk of the District Court of the Unit
States for the District of New Jersey:

In making up the transcript of the record for the appeal allowe
on July 2, 1921, to the petitioners-appellants in the above-entitle
cause, you will please include the following:

Docket Entries.

1. Petition.

2. Notice of hearing, showing acknowledgement of service.

3. Motion of the United States to dismiss the petition.

61 4. Answer of the Interstate Commerce Commission.

5. Order denying Application for Interloctutory Injunction and
denying Motion to dismiss, and Exception by petitioners noted.

6. Assignment of Errors.

7. Petition for Appeal.

8. Order allowing Appeal and granting an Injunction pending Appeal.
9. Præcipe for Appeal Record.

CHARLES E. MILLER,
HENRY WOLF BIKLE,
A. H. ELDER,
Solicitors and Counsel for Petitioners-Appellants.

Service of a copy of the within præcipe is hereby acknowledged this 7th day of July, 1921.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General, for the United States.
P. J. FARRELL,
WALTER McFARLAND,
For the Interstate Commerce Commission.

Endorsed: In the District Court of the United States for the District of New Jersey. The Central Railroad Company of New Jersey, et al., petitioners-Appellants, against United States of America, Respondent-Appellee, and Interstate Commerce Commission Intervening Respondent Appellee. In Equity No. 3075. July Term, 1921. Præcipe for Appeal Record. Charles E. Miller, Solicitor for Petitioners-Appellants, Room 33, Terminal Station The Central Railroad Company of New Jersey, Jersey City, N. J. Filed July 12, 1921. George T. Cranmer, clerk.

62 *Certificate.*

UNITED STATES OF AMERICA,
District of New Jersey, ss:

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey do hereby certify that the following is a full, true, and complete copy of the Record, on appeal in the case of the Central Railroad Company, et als. vs. United States of America.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, this 25th day of July, nineteen hundred and twenty-one.

[Seal District Court of the United States, District of New Jersey.]

GEORGE T. CRANMER,
Clerk District Court U. S.,
By CHARLES S. CHEVRIER, *Deputy.*

Endorsed on cover: File No. 28,391. New Jersey D. C. U. S. Term No. 436. The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, et al., appellants, vs. The United States of America and Interstate Commerce Commission. Filed July 28th, 1921. File No. 28,391.

Original.

Supreme Court of the United States, October Term, 1921.

No. 436.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY et al., Appellants,

versus

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees.

Appeal from the District Court of the United States for the District of New Jersey.

Stipulation.

It is hereby stipulated and agreed that Exhibit "C" (the opinion and order of the Interstate Commerce Commission in American Creosoting Company vs. Director General, et al., 61 I. C. C. 145) and Exhibit "D" (the opinion and order of the said Commission in Southern Hardwood Traffic Association, et al., vs. Director General et al., 61 I. C. C. 132) which were attached to the original petition for an injunction filed with the lower court, and which were inadvertently omitted from the transcript of the record filed with this Court, may now be made a part of the transcript of the record in this proceeding.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General,
For the United States.

WALTER McFARLAND,
For the Interstate Commerce Commission.

ALEXANDER H. ELDER,
Solicitor for the Appellants.

[Endorsed:] 436/28,391. Supreme Court of the United States October Term, 1921. No. 436. The Central Railroad Company of New Jersey et al., Appellants, versus The United States of America and Interstate Commerce Commission, Appellees. Stipulation

[Endorsed:] File No. 28,391. Supreme Court U. S., October Term, 1921. Term No. 436. The Central Railroad Company of New Jersey et al., Appellants, vs. The United States et al. Stipulation and addition to record. Filed Sept. 6, 1921.

No. 436

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Et als.,
Appellants,
against
UNITED STATES OF AMERICA, Appellee, and INTERSTATE COMMERCE COMMISSION,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MOTION BY THE APPELLANTS TO ADVANCE.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE PENNSYLVANIA RAILROAD COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; THE RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY; WASHINGTON SOUTHERN RAILWAY COMPANY; WESTERN MARYLAND RAILWAY COMPANY; ERIE RAILROAD COMPANY; THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; PHILADELPHIA & READING RAILWAY COMPANY; THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY; BOSTON & MAINE RAILROAD, and J. H. HUSTIS, Temporary Receiver; MAINE CENTRAL RAILROAD COMPANY; THE DELAWARE & HUDSON COMPANY; BOSTON & ALBANY RAILROAD COMPANY; THE LONG ISLAND RAILROAD COMPANY; CENTRAL VERMONT RAILWAY COMPANY; RUTLAND RAILROAD COMPANY, and BUFFALO & SUSQUEHANNA RAILROAD CORPORATION,

Appellants,

against

UNITED STATES OF AMERICA, Appellee, and INTERSTATE COMMERCE COMMISSION, Intervenor.

No.

Appeal from the District Court of the United States for the District of New Jersey.

MOTION BY THE APPELLANTS TO ADVANCE.

Come now The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, and others,

appellants in the above entitled case, by their solicitors of record, and respectfully move this honorable court to advance this case for argument on an early day of the present term convenient to the court.

This is a suit brought by the appellants to enjoin, set aside and annul an order of the Interstate Commerce Commission, dated March 15, 1921, requiring the petitioners, the appellants herein, to establish and maintain at Newark, New Jersey, a privilege known as creosoting-in-transit in connection with shipments of lumber, piling, telegraph cross arms, railroad ties and wooden paving blocks, consigned from points in southern classification territory to sundry destinations in northern New Jersey, eastern New York, and in New England, so long as the appellants are parties to joint rates under which other railroad companies permit such privileges on their lines at Madison, Illinois, Indianapolis, Indiana, Bloomington, Indiana, Toledo, Ohio, and Simpson, Mississippi.

The order sought to be enjoined was entered by the Interstate Commerce Commission in a proceeding instituted before that tribunal by the American Creosoting Company, a corporation of the State of New Jersey, the proceeding being carried by the Commission under its Docket No. 10582, and reported in 61 I. C. C. Reports at page 145.

After the issuance of the Commission's order the appellants filed a petition in the District Court of the United States for the District of New Jersey praying that the United States and the Interstate Commerce Commission be permanently enjoined from enforcing its said order and that a preliminary or interlocutory injunction be issued pending final hearing. The District Court denied the motion for an interlocutory or preliminary injunction, and denied also a motion filed by the United States to dismiss the petition; but the District Court allowed an appeal to this court as provided by statute (38 Stat. 220), and granted an order suspending the operation of the

Commission's order until this honorable court should determine a petition and motion to be filed with it for a preliminary suspension of said order pending this appeal.

The case is of serious moment in that the order of the Commission, if it goes into effect, will establish on the lines of the petitioners, appellants herein, a new and costly practice not heretofore in effect on their respective lines of railroad; and since, under the law and the rules of the Interstate Commerce Commission regarding the filing of tariffs, connecting lines,—parties with these petitioners to joint rates—may establish local practices at points on their lines in connection therewith without the consent or concurrence of the petitioners, the order would operate to subject the policies and practices of the petitioners to the control of connecting lines with which they are parties to such joint rates, irrespective of the fact that the petitioners have no control over the local policies and practice which such lines may establish.

Furthermore, if the petitioners are required to obey the order, their position will prove peculiarly difficult in that there will be introduced a practice which has not heretofore obtained in the territory in which they operate which will tend to create claims on the part of other shippers of the same and similar commodities from or to points on their lines—in whose favor no such privilege is established—that undue prejudice has been created against them because of the establishment of the privilege of creosoting-in-transit at Newark.

This appeal raises the question of law whether a carrier is chargeable, under the Interstate Commerce Act as amended, with causing undue prejudice against a shipper located on its line because it declines to provide a certain privilege or service, such as transit, storage, reconsignment, diversion, elevation, icing, switching, etc., at a point on its line while participating in joint rates applicable through said point in connection with which, other carriers participating in said joint

rates, provide such a privilege or service at local points on their lines, without the participation or concurrence of such carrier in said privilege. In the proceeding before the Commission which gave rise to this suit the Commission with one of its members dissenting, departed from the construction of the law it had previously adhered to for many years. The early determination of the question involved is, therefore, of very great importance not only to the appellants but to all other carriers engaged in interstate commerce.

Because of these facts, and because further the order of the Commission relates to interstate traffic currently in the course of transportation, it is of public importance that the case should be promptly decided so that the uncertainty as to the proper construction of the Commerce Act may be removed, and your petitioners believe that the issues are of such importance, and of such grave public interest, that this motion to advance should be granted.

Respectfully submitted,

HENRY WOLF BIKLE,
CHARLES E. MILLER,
ALEXANDER H. ELDER,
Solicitors for Appellants.

July 30, 1921.

No. 436.

OCTOBER TERM, 1921.

IN THE

Supreme Court of the United States

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE PENNSYLVANIA RAILROAD COMPANY, ET AL., Appellants,

vs.

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

CHARLES S. MILLER,
ALEXANDER H. ELDER,
HENRY WOLF BIKLE,
Of Counsel.

Baker, Lott & Baker, Inc., Washington, D. C.

INDEX.

LIST OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921. No. 436.

The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company et al., Appellants,

vs.

The United States of America, and Interstate Commerce Commission.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT OF THE CASE.

This case comes to the Supreme Court on appeal from an order of the United States District Court for the District of New Jersey, denying the application of the appellants, (petitioners below), for a preliminary injunction to restrain the enforcement of an order issued by the Interstate Commerce Commission March 15th, 1921, in the case of American Creosoting Company *vs.* The Central Railroad Company of New Jersey, *et al.*, known on the docket of the Interstate Commerce Commission as Case No. 10582 (R. 24).

The appeal is authorized by Act of Congress 38 Stat. L., 219, 1913.

The case before the Interstate Commerce Commission had its inception in a petition filed by the American Creosoting Company, complaining of the failure of the defendant carriers, the appellants in this Court, to establish at Newark, New Jersey, a practice or privilege known as creosoting-in-transit.

Two grounds of complaint were alleged:—

(*a*) That the failure to establish the practice or privilege was unjust and unreasonable (R. 15), and

(*b*) That the failure to establish the practice or privilege was unjustly discriminatory and unduly preferential and prejudicial because of the fact that other railroad companies, not parties to the proceeding but with which the defendant carriers participated in joint rates, maintained the practice or privilege of creosoting-in-transit at points on their lines (R. 14-15).

Creosoting-in-transit is a practice or privilege whereby a shipment of lumber consigned from point A to point C may be stopped off at an intermediate point, B, and there subjected to the process known as creosoting, and subsequently forwarded to the original destination C, under the rate or rates applying on a through, uninterrupted shipment from A to C. Where the privilege has been established and is availed of, the lumber is delivered at the creosoting plant—just as at a final destination—there unloaded and treated, and later re-delivered to the carrier—just as at an initial point of shipment—so that the application of the rate applying to a through, uninterrupted shipment from A to C. involves the fiction that two shipments, constitute, for the purpose of the application of rates, a single transportation service. Like other transit privileges, such as milling-in-transit, fabrication-in-transit, etc., the carrier establishing such practice is justified in charging for the privilege, and, as a rule, such charges are in effect where the privilege obtains.

The Interstate Commerce Commission, after hearing,

found that the failure of the defendant railroad companies to establish the privilege or practice of creosoting-in-transit at Newark was not unreasonable (R. 23), but that these companies, insofar as they respectively participated in tariffs carrying joint rates on lumber, piling, telegraph cross-arms, railroad ties, and wooden paving blocks, applying through Newark from points in Southern Classification territory to points in northern New Jersey, eastern New York and New England, permitting, in connection with such joint rates, creosoting-in-transit at Madison, Indianapolis, Bloomington, Toledo or Simpson, while contemporaneously denying similar transit arrangements at Newark, subjected the Creosoting Company to undue prejudice and disadvantage (R. 23). The points named at which the creosoting-in-transit privilege is in effect *are not located on the lines of these appellant., defendants before the Commission.*

In other words, the Commission held that there was no violation of Section 1 of the Interstate Commerce Act, but that there was a violation of Section 3.

The following facts were found by the Commission:—

(*a*) That the plant of the American Creosoting Company in Newark is reached only by The Pennsylvania Railroad Company and the Central Railroad Company of New Jersey (R. 18), petitioners in the District Court and appellants here, and by water carriers (R. 19).

(*b*) That neither The Pennsylvania Railroad Company nor the Central Railroad Company of New Jersey accords the privilege of creosoting-in-transit at any points on their respective lines (R. 21).

(*c*) That no competitors of the American Creosoting Company are located upon the rails of The Pennsylvania Railroad Company or of the Central Railroad Company of New Jersey (R. 20).

(*d*) That there is no point on any railroad in Trunk Line territory where the creosoting-in-transit privilege is allowed by any railroad except Broadford Junction, in the State of Pennsylvania (R. 21). This privilege at Broadford Junction is allowed only by the Pittsburgh & Lake

Erie Railroad Company (R. 21), which was not one of the defendants in the proceeding before the Interstate Commerce Commission.

(*e*) That the points in comparison with which the Commission, by its report, found that the plant of the Creosoting Company at Newark was unduly prejudiced are Simpson, Mississippi; Madison, Illinois; Indianapolis and Bloomington, Indiana; and Toledo, Ohio (R. 8, 19, 23), points located on the lines of railroads, none of which was party to these proceedings.

The appellant carriers have not participated in or been consulted with respect to the establishment of the privilege of creosoting-in-transit on the lines of such other railroads. Under the Interstate Commerce Act and the rules of the Commission governing the publishing, posting and filing of tariffs, local privileges such as and including creosoting-in-transit are permitted to be established by any carrier party to a joint through rate at any point on its line without consulting, or securing the concurrence of, any other carrier party to such joint through joint rate; and the privileges so established and referred to in this case were established without the concurrence or participation of the appellants (paragraph 14 of the petition: R. 8).* As the appellant carriers are not parties to such local tariffs they receive no part whatever of the revenue derived from the local practices of the railroads.

The District Court, after hearing argument, denied the petitioners' application for a preliminary injunction, and also the motion of the United States to dismiss the petition (R. 24-25). No written opinion was filed.

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* The statement on page 15 of the brief filed by the Government in opposition to the Appellants' Petition for a suspension of the Commission's order pending appeal, that "Appellants concur in the through tariffs establishing creosoting in transit on connecting lines, presumably for the reason that benefits and advantages accrue to appellants from so doing," is not correct, and is not supported by anything in the record. The creosoting in transit privilege is not established by through or joint tariffs, but by local tariffs of the individual carriers establishing it. See paragraph 14 of the Petition, R. 8, and Brief of the Interstate Commerce Commission, page 15.

ASSIGNMENTS OF ERROR.

The above-named petitioners now come by their solicitor and counsel and in connection with their petition for appeal, file the following assignments of error on which they will rely on said appeal to the Supreme Court of the United States from the order of the District Court entered July 2d, 1921, denying the petition for an interlocutory or preliminary injunction in the above-entitled cause.

The District Court erred:—

I.

In denying the motion of the above-named petitioners for an interlocutory injunction *pendente lite* restraining the order of the Interstate Commerce Commission described in the petition for an injunction, for the reasons set forth in said petition.

II.

In not granting the application of the above-named petitioners for an interlocutory injunction *pendente lite* restraining the order of the Interstate Commerce Commission described in the above-entitled cause.

III.

In not holding and adjudging that the order of the Interstate Commerce Commission referred to in the petition herein was, as disclosed by the Commission's opinion, unsupported by facts disclosing a violation by the above-named petitioners of the Act to Regulate Commerce.

IV.

In not holding and adjudging that said Interstate Commerce Commission was without lawful authority to make the order complained of in the above-entitled cause.

V.

In not holding and adjudging that said order of the Interstate Commerce Commission complained of in the above-entitled cause deprives your petitioners of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

VI.

In not holding and adjudging that, as to the petitioners other than the Pennsylvania Railroad Company and The Central Railroad Company of New Jersey, whose rails do not reach the plant of the American Creosoting Company at Newark, said order of the Interstate Commerce Commission complained of in the above-entitled cause was, as disclosed by the said Commission's opinion unsupported by facts disclosing a violation of the Act to Regulate Commerce; was unwarranted by said Act, and involved a taking of said petitioners' property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

VII.

In not finding and deciding that, as a matter of law, an interstate common carrier is not chargeable with causing undue prejudice and disadvantage by denying a creosoting-in-transit privilege at a local point on its line merely because it concurs in joint freight rates applicable through said point in connection with which rates certain other participating carriers at local points on their line accord such creosoting-in-transit privilege.

ARGUMENT.

This appeal presents the question of law whether or not a carrier is chargeable with causing undue prejudice in violation of Section 3 of the Interstate Commerce Act as against a shipper located at a point on its line because it declines to provide at that point a certain local privilege or service, the withholding of which is specifically found by the Commission to be not unreasonable, while it participates in joint rates applicable through the said point, in connection with which other carriers parties to such rates provide such a privilege at local points on their lines *without the participation, concurrence or consent of the carrier* charged with violation of the Act.

Prior to the decision and order of the Commission now in controversy, the Commission had held in various cases, referred to below, that under such circumstances a carrier was not chargeable with violation of Section 3 of the Interstate Commerce Act. The legal question raised is of very great importance, not only to the appellants herein, but to all other carriers engaged in interstate commerce, since, if the decision of the Interstate Commerce Commission be correct, it would seem to follow that a carrier's mere participation in joint rates opens it to the charge of undue preference or undue prejudice, unless it conforms all of its local privileges and practices to those of the lines with which it may have established joint rates, even though it derives no revenue from such local privileges and practices and even though they do not involve any consent, concurrence or participation on its part, but are entirely within the control of other carriers.

The carriers here are not questioning any administrative finding of the Commission that a given prejudice or discrimination is undue or unjust. Such a finding of the Commission relates to an administrative question of fact, and is not reviewable in the Courts. The reliance here is on the principle of law that there is *no* prejudice or discrimination prohibited by the Act when the carrier charged with such prejudice or discrimination is not responsible for the facts out of which it is claimed to arise.

It is well settled that the orders of the Commission may be set aside when they are based upon a mistake of law: I. C. C. *vs.* Union Pacific, *222* U. S. 541, 547 (1912). Thus in Texas & Pacific Railway *vs.* I. C. C., 162 U. S. 197 (1896) this Court set aside an order of the Commission because that tribunal refused to take into consideration, and give effect to, the competitive conditions surrounding import traffic as distinguished from domestic traffic: in I. C. C. *vs.* Diffenbaugh, *222* U. S. 42 (1911) this Court set aside another order because the Commission had condemned an allowance to a shipper, not because of inherent illegality, but because of supposed collateral consequences (see page 46): so in P. & R. Ry. *vs.* U. S., 240 U. S. 334 (1916) this Court set aside an order of the Commission finding discrimination against Jersey City in the matter of cement rates, because other carriers than the carrier charging the rate complained of had in effect lower rates, the case originating out of the complaint of the shipper charged the higher rate: in I. C. C. *vs.* Stickney, 215 U. S. 98 (1909) this Court condemned an order of the Commission finding a terminal charge unreasonable because the evidence showed that the charge was in itself reasonable and that the Commission has been influenced to hold it otherwise by its views as to the aggregate charges including that for transportation: in Southern Pacific Co. *vs.* I. C. C., 219 U. S. 433 (1911), this Court set aside an order of the Commission reducing rates because the Commission based the order on the theory that the carrier was estopped from charging higher rates under the circumstances of the case.

1. A carrier is not chargeable with a violation of Section 3 of the Interstate Commerce Act unless it participates in the service which is claimed to cause the undue prejudice prohibited.

In other words, there is no infraction of the Section unless a carrier, serving two shippers, treats them differently in respect to the service which *it* renders, without just cause.

The applicable portion of Section 3 of the Interstate Commerce Act, viz., the first paragraph (24 Stat. L. 380), reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Government, in its brief in opposition to the appellants' motion for a suspension of the Commission's order pending appeal, also quotes paragraph 3 of Section 3; but a reading of that paragraph indicates very clearly that it does not apply to the present litigation. It will also be found that neither paragraph 2, nor paragraph 4 of Section 3 has any application to the case.

Section 15 of the Interstate Commerce Act, also quoted in the same brief of the Government (page 12), is one of the jurisdictional sections of the Act. It does not expand the duties and obligations which are devolved upon the carriers by the other sections, principally Sections 1, 2, 3 and 4, but it establishes the power of the Commission to enforce these duties and obligations. As illustrated by the Tank Car Case, U. S. *vs.* P. R. R., 242 U. S., 208 (1916), carrier duties and Commission power are not necessarily correlative.

Section 3 forbids any common carrier making or giving any undue or unreasonable preference or advantage to any particular person, or subjecting any particular person, etc., to undue or unreasonable prejudice or disadvantage. The prohibition against undue prejudice and disadvantage is the correlative of the prohibition against undue preference and advantage. The very word "preference" carries with it the thought of different treatment of two patrons by the

same carrier. So also with respect to the words "advantage" or "disadvantage" and "prejudice," no carrier can create any advantage or disadvantage, or undue prejudice, unless, by its act, it places the one shipper in a more or less favorable position than it places the other. If this were not true the disadvantage, prejudice, etc., would arise not from its act, but from extraneous circumstances, with the result, illustrated in the case at bar, that a carrier would be required to accord a privilege, found upon hearing not reasonably demandable as to that carrier, merely because some other carrier granted the privilege under circumstances not in proof.

The decisions hold that if a given commodity may be shipped to a common destination from different points of origin via the lines of two different carriers, there is no violation of Section 3 even though the rates may be on an entirely different basis, relatively, and even though the effect of such different bases of rates is practically to exclude the shippers located at one point of origin from the common market. In other words, if two stone quarries are located, the one at point A on the X Railroad, the other at point B on the Y Railroad, both approximately 30 miles from the common consuming point, C, there is no violation of Section 3 of the Interstate Commerce Act if the X Railroad maintains a rate of 70 cents a ton, while the Y Railroad maintains a rate of 40 cents a ton. In such case neither road treats two of its shippers differently, in respect to the service which it renders, and unless the rate challenged is inherently unreasonable, there is no violation of law.

Thus, as far back as 1901 this Court said:—

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."
>
> East Tennessee R. Ry. Co. *vs.* I. C. C., 181 U. S. 1 (1901), at page 18.

The Interstate Commerce Commission, in many cases, has followed this construction of the Act.

Thus in Eau Clair *vs.* C. M. & St. P. Ry. Co., 4 I. C. C. 65 (1892), Mr. Chairman Knapp said, at page 78:—

> "It would be quite absurd to charge a railroad with giving preference or advantage to a community which it does not serve, and it is equally illogical to say that it can prejudice or discriminate against such a community. All these terms imply comparison and the basis of comparison is wanting unless the rates compared are made by the same carrier."

In Chicago Lumber & Coal Company, *et al. vs.* Tioga Southwestern Railway Company, *et al.*, 16 I. C. C. 323, (1909), the Interstate Commerce Commission holds (page 332): —

> "Regarding the charge of discrimination because of higher rates on the lines west of the river than east thereof, it is only necessary to say that a carrier cannot discriminate within the meaning of the statute except as between those whom it serves or whom it may lawfully be required to serve. It *is not guilty of discrimination merely because it does not afford as favorable rates as others serving a different territory, though the products carried by each are brought to the same market** The law does not deal in these matters with all carriers collectively as a single unit or system, but its commands are directed to each, with respect to the service which it is required to perform."

To the same effect are the following cases:—

Friend Paper Company *vs.* C. C. & St. L. Ry. Co., 18 I. C. C. 178 (1910);

National Petroleum Association *et al. vs.* Missouri Pacific Ry. Co. *et al.*, 18 I. C. C. 593 (1910);

* Italics ours.

Johnson & Company *vs.* A. T. & S. F. Ry. Co., 21 I. C. C. 637, at page 639 (1911);
Sunflower Glass Company *vs.* Missouri Pacific Ry. Co. *et al.*, 22 I. C. C. 391, at page 392 (1912);
Blodgett Milling Co. *vs.* C. M. & St. P. Ry. Co. *et al.*, 23 I. C. C. 448, at page 449 (1912);
Hennepin Paper Company *vs.* N. P. Ry. Co., 27 I. C. C. 699, 701 (1913);
Iron Ore Rate Cases, 41 I. C. C. 181, 190 (1916);
Lumber from Oklahoma, 42 I. C. C. 567, 569 (1917);
Galloway Coal Company *vs.* Alabama & Great Northern Railway Company, *et al.*, 40 I. C. C. 311, 315 (1916).

The Commission has applied these principles in sundry instances to cases involving the same character of controversy as that here presented.

In Schmidt & Sons *vs.* M. C. R. R. Co., 19 I. C. C. 535 (1910), the complaint alleged that the Michigan Central and other railroads were discriminating against a plant located at Detroit because in connection with the joint rates on wool from the west to Boston, certain of the participating carriers allowed a "stop-off" privilege at Omaha, while the carriers serving Detroit denied such privilege there. The Commission disposed of this complaint in the following terms:—

> "Omaha enjoys advantages under the carriers' tariffs which Detroit regards herself as entitled to, but the carriers which serve Omaha are not those which serve Detroit. The western carriers as a matter of policy give Omaha a certain privilege which the eastern carriers as a matter of policy deny to Detroit. This affects Detroit, no doubt, injuriously to some extent, but it is difficult to see how it can be remedied (1) because the carrying lines involved at the two cities are not the same, and (2) because to uphold such claim on the part of Detroit would justify, if not require, a wide

extension of the privilege to other points. If we give to Detroit a transit privilege, every other point within Official Classification territory would properly feel that it would be entitled to such privilege. And instead of extending such privileges, we believe it should be our policy to curtail them to as great a degree as may be consistent with the industrial development of the country, for our investigations show that they are the source and aggravating cause of many of the most serious complaints brought to our notice. We feel that we are compelled, therefore, upon principle, to deny the petition for a transit privilege at Detroit." (Pages 537-8).

To the same effect are the following cases:—

Paducah Cooperage Co. *vs.* N. C. & St. L. Ry. 22 I. C. C. 226, 231-232 (1912);
Grain & Hay Exchange *vs.* P. Co., 32 I. C. C. 409, 412 (1914).

In this last case the same joint rate argument on which the Commission rests its present decision was made and rejected.

So also:—

Indianapolis Chamber of Commerce *vs.* C. C. C. & St. L. Rwy. Co., 34 I. C. C. 267, 270 (1915);
Meridian Grain & Elevator Co. *vs.* A. & V. Ry. Co., 38 I. C. C. 478, 480-481 (1916);
Nashville Lumbermen's Club *vs.* L. & N. R. R. Co., *et al.*, 40 I. C. C. 59, 62 (1916).

These decisions are referred to because of the rule that the views of a Government Commission or official charged with the enforcement of a statute are entitled to special weight with respect to its proper interpretation: New Haven, etc., Railroad *vs.* Interstate Commerce Commission, 200 U. S., 361, at page 401 (1916); Logan *vs.* Davis, 233 U. S., 613, at page 627 (1914); National Lead Company *vs.* U. S., 252 U. S., 140 (1920), at pages 145 and 146. This con-

sideration is especially persuasive in this case because of the facts, that the Commission's interpretation extended over a substantial period, and that, although the Interstate Commerce Act was amended in the interval, it was not so amended as to change the provisions of the law in this regard: Lewis's Sutherland on Statutory Construction, 2 Ed., Vol. 2, Sec. 403 (page 780); Sessions *vs.* Romadka, 145 U. S., 29, 42 (1892); Logan *vs.* United States, 144 U. S., 263, 303 (1892).

But the principle so frequently applied by the Commission was discarded in the present case* and in the companion case decided at the same time, viz:

> Southern Hardwood Traffic Association Case 61 I. C. C. 132 (1921) (R. 25).

It is manifest, therefore, that in the present case the Commission has made a new departure which it seeks to justify upon the provisions of the Transportation Act, 1920. But no change was effected by this Act in the applicable portion of Section 3 of the Interstate Commerce Act. The Commission makes the general statement that the Transportation Act of 1920, has greatly enlarged its powers "and among other things we have been given authority to establish minimum rates" (R. 33-34). What connection exists between the minimum rates and Section 3 is not disclosed.

In October, 1920, after the passage of the Transportation Act, the Commission decided, in Tennessee Copper Company *vs.* Director General, *et al.*, 59 I. C. C. 253, that the failure of the carriers serving Baltimore to establish at that point a transit privilege known as refining-in-transit, did not disclose a violation of the third section because of refining arrangements at Perth Amboy, Maurer, Chrome, etc. The Commission said:—

> "No carrier reaching Baltimore participates in, or controls, the refining arrangements at Perth Amboy,

* In the District Court counsel for the Commission urged that these former decisions did not disclose the Commission's view of the law, but its administrative conclusions; but apparently upon further reflection this distinction is abandoned (I. C. C. Brief, pages 15-16).

Maurer, Chrome, or Laurel Hill, and no defendant can exercise, at its election, the alternative of discontinuing such arrangements there, or establishing them at Baltimore."

2. A carrier is not chargeable with participating in the local practice of another carrier merely because it participates in joint rates with such other carrier.

As has been pointed out, the Commission seeks to lay hold of the joint rates in which the appellants participate with western and southern carriers as the basis of its charge of undue preference, etc., in spite of the fact that *these local practices are established without the consent, participation or concurrence of the appellant carriers.* In fact, the appellants have no way of controlling the action of their connections, either in respect of the establishment or the withdrawal of these local practices and privileges. And there is no such connection between the local practice or privilege and the joint rate as renders participation in the one participation in the other. They stand independent of each other, unaffected by the fact that the rate in connection with which the local practice or privilege applies is a joint rate or a combination rate.

In fact the Interstate Commerce Act prescribes that a carrier party to a joint tariff must be shown as a participating carrier. Thus paragraph (4) of Section 6 (34 Stat. L. 584) provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission. * * *"

Clearly, the law contemplates that a carrier shall not be

regarded as participating in tariffs except when it is a party thereto. In addition, there is no connection between the joint rates and the local privilege.

To illustrate: Consider a point of production in the South from which joint rates on lumber are *not* in effect to given destinations in the North. In such case a shipment of lumber may, nevertheless, be consigned through to such northern destinations, and the rates charged will be the combination of rates applicable to and from some intermediate point. For the Interstate Commerce Act specifically provides (paragraph 1, Section 6, 34 Stat. L. 584):—

> "If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation."

While, when a joint through rate is established, it is ordinarily less than the sum of the combination of rates on some intermediate point, this is not a necessary feature of a joint rate, and, in fact, thousands of joint rates are the equivalent of the combination of so-called locals based on some intermediate point. In such a case, the handicap resulting to a shipper who does not have the transit privilege, while it is accorded his competitor on another railroad participating in the transportation of the shipments, has no relation to the existence or non-existence of a joint rate. He will be just as much handicapped if the shipment moves on the aggregate of the intermediate rates as if it moved on a joint rate. The handicap is not contingent on whether the through rate is a joint rate. The disadvantage results from the establishment of the local privilege on the connecting line and the control of and responsibility for this rest-alone with the railroad establishing it.

The illustration also shows that *it is not the participation in joint rates which makes the railroads instruments of discrimination.* The law requires the carriers to move the traffic, and no undue prejudice or discrimination can arise as a result of the service so rendered. Nor has the

Interstate Commerce Commission undertaken to make this a basis of its finding.

The Government and the Commission rely on the decision of this Court in the case of U. S. *vs.* Louisville & Nashville Railroad, 235 U. S. 314 (1914):

But, in that case this Court did not sustain the Commission's finding under Section 3 of the Interstate Commerce Act, but did uphold it under Section 4. In this case there is no pretense that Section 4 is involved, or violated.

The case at bar is different also from the other case in this Court, relied on by the Government and the Commission, St. Louis, S. W. Ry. *vs.* U. S., 245 U. S. 136 (1917), in which the Commission found the language which it quotes in this case, viz., that though the rails of carriers do not reach a given locality, nevertheless they may, by handling traffic to or from such point "become effective instruments of discrimination."

It is quite true that a railroad may be guilty of discrimination against a locality, although its rails do not reach that locality; but the appellants in this case are not contending otherwise. *What they are contending is that a carrier cannot be charged with discrimination unless it participates in that which is claimed to cause the discrimination.* In the case cited, the discrimination arose as a result of a joint rate, which was found to be improperly adjusted with respect to another rate. The carrier participated in both rates.

The conclusive decision seems to be Penn Refining Company *vs.* W. N. Y. & P. Railroad, 208 U. S. 208 (1908). In that case the Commission had entered an order holding the Western New York & Pennsylvania Railroad Company and the Lehigh Valley Railroad Company guilty of a discrimination in violation of Section 3, because, on shipments of oil moving from western Pennsylvania under joint rates to Perth Amboy, they charged for such shipments, when moving in barrels for the weight of the oil and the containers, whereas, when such shipments moved in tank cars, they charged for only the weight of the oil. The Supreme Court decided that the order of the Com-

mission should be set aside upon the ground that the facts found by the Commission did not warrant the order. The significant part of the decision in connection with the instant case is the principle that, under no circumstances, should the Lehigh Valley Railroad Company have been held for the alleged discrimination merely because it participated in joint rates. In this connection, the Supreme Court said (page 221):—

> "There are other reasons in addition to the foregoing why the Lehigh Valley should not be held for any discrimination in this case. That company was but a connecting carrier and took the cars as they were delivered to it by the initial carrier at Buffalo for transportation to Perth Amboy. It was the duty of the connecting carrier to do so, and it was not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy, which was in itself reasonable. Nor did the eighth section of the Commerce Act render it liable for any such alleged wrongful act asserted against the initial carrier."

The Penn Refining case holds that, even though the practice of one of the carriers under a joint rate is discriminatory, a connecting carrier, if it is not a party to the practice, is not responsible, though it shares in revenue resulting therefrom. *Here the appellants do not even share in any way in the revenue which their connections receive for the granting of the transit privilege at local points on their lines.*

3. An order of the Commission based solely upon a violation of Section 3 must be in the alternative, leaving the carrier free either to extend the practice or privilege to the complaining patron or to withdraw it from all. The order in this case, although in form an alternative order, leaves no real alternative in fact and actual operation.

It should not be forgotten that the Interstate Commerce Commission specifically found that the failure on the part of the appellants to establish the creosoting-in-transit privilege at Newark was not unreasonable. Under these circumstances, the Commission could not require its establishment at this point simply because it has been established at other points. Even had it been established at other points on the lines of the appellants, all that the Commission could do would be to order the carriers to cease the discrimination found to exist, by either establishing the privilege at Newark, or withdrawing it at the other points on their lines:—

Great Northern Railway Company *vs.* Minnesota, 238 U. S., 340 (1915).

In that case, an order of the State Commission of Minnesota was held unconstitutional and in violation of the Due Process Clause, which attempted to require affirmatively that a railroad should establish scales for certain of its patrons because it established them for certain others. The Court points out that all that can be required is the discontinuance of the discrimination. Any other course offends the Due Process Clause of the Constitution.

This is settled practice with the Interstate Commerce Commission. If there is nothing unreasonable in the carrier's failure to establish a certain practice, there is no basis on which it can be required to do so merely because it establishes such practice elsewhere. To require it affirmatively to establish it in all cases because it has done so in certain instances would be to extend its affirmative duties beyond those which the law imposes upon it. In such cases, therefore, all that the law authorizes is that the differential practice may be required to be discontinued.

Thus in the Great Northern case, *supra*, this Court said, at page 346:—

> "The Railway Company does not presently controvert the finding that scales at Eagle Bend and Hewitt brought about discrimination, but maintains the Commission acted arbitrarily and unreasonably in seeking to eliminate this by peremptorily requiring construc-

tion of another without giving opportunity to accomplish the same result through discontinuing the use of those already installed. This contention is sound and must be sustained. Conceding power to inhibit discrimination the Commission could not exercise it unreasonably by needlessly taking property or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. Missouri Pacific Railway *vs.* Nebraska, 164 U. S. 403, 417; Donovan *vs.* Pennsylvania Company, 199 U. S. 279, 293; Missouri Pacific Railway *vs.* Nebraska, 217 U. S. 196, 206."

See also St. Louis S. W. Ry. Co. *vs.* United States, 245 U. S. 136, 145 (1917).

The Commission has held many times that the test of discrimination is the ability of one of the carriers participating in two through routes to put an end to the discrimination by its own act. Ashland Fire Brick Company *vs.* Southern Railway, 22 I. C. C. 115; Memphis Freight Bureau *vs.* B. & O. R. R., 28 I. C. C. 543; Grain Elevation Allowances at St. Louis, 30 I. C. C. 696; Hughes Creek Coal Company *vs.* Railroads, 29 I. C. C. 671, etc. And in Tennessee Copper Co. *vs.* Director General, 59 I. C. C. 253 (1920) the Commission indicates that in respect to a transit privilege, the alternative must permit the withdrawal at the point claimed to be preferred. Thus Chairman Clark says:—

"No carrier reaching Baltimore participates in or controls the refining arrangements at Perth Amboy, Maurer, Chrome, or Laurel Hill, and no defendant can exercise at its election the alternative of discontinuing such arrangements there or establishing them at Baltimore. Ashland Fire Brick Co. *vs.* S. Ry. Co., 22 I. C. C., 115."

In the case at bar, however, the appellants, having had no voice or participation or concurrence in the establishment of the transit privilege on the lines of their connections, are powerless to bring about its discontinuance, and therefore have no alternative. The Commission urges (brief, page 17) that there is an alternative in that the appellants can cancel their participation in the joint rates through Newark, or—what is for all practical purposes the same thing—qualify their concurrence in such rates to joint rates through Newark in connection with which transit is not accorded on the lines of any of the connecting carriers. These two propositions are really one, viz., that the appellants can cancel their participation in the joint rates in connection with which the local privilege of transit is established by other carriers. Apart from the fact that the joint rates are so firmly embedded in the rate structure of the country as to make this cancellation a practical impossibility, this suggestion of the Commission is illusory, particularly in view of the obligation of the carriers in proper cases to establish joint rates, an obligation enforceable by the Interstate Commerce Commission: St. Louis S. W. Ry. Co. *vs.* U. S., 245 U. S. 136 (1917). There is no connection between the joint rate and the local practice. In such cases the cancellation of the joint rates would not remove the handicap resulting from the establishment of the transit privilege. The cancellation of the joint rates would not necessarily change the rate situation or withdraw the privileges. Section 6 provides for the application of "separately established rates * * * to the through transportation," "if no joint rate over the through route has been established."

The Commission concedes, in its brief, that these carriers are powerless to discontinue the local practice on the lines of their connections—the practice which is claimed to create the discrimination. The carriers are equally powerless to refuse to transport traffic moving via the roads affording the privilege. There is no alternative.

In the case of roads like the Norfolk & Western, the Philadelphia & Reading, etc., which are parties here, whose lines do not reach either Newark or the points where the transit privilege is established no alternative whatever is offered. They are constrained to withdraw from the joint rates unless the two lines serving the Creosoting Company at Newark establish the privilege at that point. These companies are unable to control what shall be done either at Newark or at the points where the transit privilege is in effect.

4. If Section 3 of the Interstate Commerce Act were construed as the Commission has construed it in this case, it would be unconstitutional as violative of the Due Process Clause of the Fifth Amendment to the Constitution.

The decision of the Supreme Court in the Great Northern Railway case, *supra*, supports this conclusion. Since there is no affirmative duty on the part of the appellants to establish the creosoting-in-transit privilege at Newark, *the Commission having expressly found that it is not unreasonable for them to withhold it at this point*, it is clear that they could not be required to establish it even if they were to establish it at other points on their lines; all that the Commission could do would be to require the extension of the privilege at Newark or its *withdrawal* at such other points; and yet in this proceeding the Commission is attempting to force its establishment by indirection, because (*a*) *connecting* lines have established it, and (*b*) because the appellants

are parties with these connecting lines to joint rates applying through Newark.

The second ground for the Commission's action overlooks the fact that participation in the joint rate does not involve participation in the local practice, whereas, measuring the appellants' practices by the practices of their connections, it takes away from them the control of the legality of their own conduct, and makes the legality of such conduct depend on what other carriers do. It hardly needs argument to demonstrate that a rule of law which charges illegality, not because of what a person does, but because of what someone else does is arbitrary and a deprivation of property without due process of law.

The Commission's order offends the fundamental principle that no one shall be held to answer for damages or otherwise, except for some act for which he is responsible. On this principle, as well as on the principle that where a public service corporation fails, not in a positive affirmative duty which it owes its patrons, but in its duty to give them equality of treatment, it must be accorded the alternative of extending the privilege in the one case, or withdrawing it in the other, the case discloses the exertion of arbitrary power which offends the due process clause.

In such case, it is well settled law that the Court will decline to adopt an interpretation of the Act which would involve a condemnation of it on the score of unconstitutionality, and will prefer the interpretation which relieves the legislation of constitutional infirmity: U. S. *vs.* D. & H. Co. 213 U. S. 366 (1909) at page 407, and cases cited. But a proper interpretation of the Act justifies, and in fact, requires setting aside the Commission's order.

5. General Considerations.

The principle on which the appellants rely is not an academic one but one of the utmost consequence.

As the facts found by the Commission disclose, the carriers operating in Trunk Line territory have steadfastly refrained from establishing in the territory which they serve

the privilege of creosoting-in-transit. The obvious depletion of revenues which would result is a sufficient reason for this policy but, added to this, is the fear that the extension of such transit privileges would tend to break down the rate structure.

In this case, for example, the effort is made to constrain The Pennsylvania Railroad Company and the Central Railroad Company of New Jersey, and the other carriers less immediately, to establish on their lines a practice which they regard as inimical to their interests, and not necessary for the proper service of their patrons. *The Commission finds that their decision in this regard is not unreasonable,* but because some connecting lines, over which they have no control, establish local privileges without any participation on their part, they are to be required to do the same or withdraw from the traffic. If this principle is sound with respect to creosoting-in-transit, it would seem to apply to all transit practices, to storage, elevation, icing, feeding of cattle, demurrage, weighing, etc.

For instance, it will be permissible to charge a carrier serving the Atlantic Seaboard ports with discrimination if it does not maintain the same regulations and practices at the Atlantic Seaboard as are maintained by different lines serving the Gulf ports. It is no answer to say that it will remain for the Commission to determine, as a question of fact, whether such differential practices create undue preference or discrimination.

If the Commission were right, a carrier would cease to be able to determine what policies shall prevail on its own road, and this control would pass to its connections.

Moreover, it should be remembered that *the legality or the illegality of its practice is made to depend, not on its act, but on an unrelated circumstance, viz., the acts of its connections.* In the present case, for example, if the lines in the southern or western territory should withdraw the transit privilege, the appellants would immediately cease, in the eyes of the Interstate Commerce Commission, to be free from any violation of law. What is to be said of the case where certain of the connec-

tions of carrier A maintain one practice, and other connections maintain another practice? In this case carrier A cannot choose but disobey the law if the Commission's views are upheld. If A refrains from establishing the practice, he is guilty of discrimination. If he establishes the practice in accord with that on the lines of the first class of connections, he is guilty of discrimination because of the difference which exists between such practices and those established on the second group of carriers; and also if he follows the practices on the lines of the second group of carriers.

CHARLES E. MILLER,
ALEXANDER H. ELDER,
HENRY WOLF BIKLÉ,
For Appellants.

OCTOBER, 1921.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF New Jersey, The Pennsylvania Railroad Company, and Twenty-one Other Common Carriers by Railroad, appellants, v. UNITED STATES OF AMERICA, APPELLEE, AND INTERSTATE COMMERCE COMMISSION, intervenor.	No. 436.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

BRIEF FOR THE UNITED STATES.

This is an appeal from an order of the District Court (Circuit Judge Davis and District Judges Rellstab and Bodine all concurring), sitting at Trenton, July 2, 1921, denying application of appellants for preliminary injunction in a suit to enjoin the order of the Interstate Commerce Commission in *American Creosoting Co.* v. *Director General, etc.* (61 I. C. C. 145). The appeal is authorized by Urgent Deficiencies Act, October 22, 1913 (38 Stat. 219, 220).

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STATEMENT OF FACTS.

Southern Classification territory embraces all of that area lying south of the Ohio River and a line drawn from near Huntington, West Virginia, to Norfolk. Official Classification territory embraces all of that area lying north of the Southern Classification territory, east of the Mississippi and to the north *via* Chicago and the western shore of Lake Michigan, including the southern peninsula of Michigan; thence *via* the Canadian boundary east to the Atlantic Ocean. Official Classification territory is divided into Central Freight Association territory, Trunk Line Association territory, and New England Freight Association territory. The first two are divided by a line running from Buffalo to Pittsburgh, to Charleston, and southward. The latter two are divided by the line which forms the western boundary of Vermont, Massachusetts, and Connecticut, excluding Long Island.

The trunk-line carriers operating from south to north, including all of the appellants, under the two classifications and in the territories indicated, have published and filed their joint and concurrent tariffs of rates and charges for the carriage in carloads of railroad ties, telegraph cross arms, and wood paving blocks. These commodities are purchased and consumed in large quantities by the railroad companies, telegraph companies, and municipalities, respectively.

Creosoting-in-transit is a privilege granted by carriers by which the ties, cross arms, and blocks

are first carried from point of origin to a point where is located a creosoting plant, at which the commodity is unloaded and treated; after treatment the commodity is reloaded and carried to final destination on the through rate applicable from the original point of origin to final destination as if untreated. The principal creosoting plants are located at Simpson, Mississippi; Madison, Illinois; Indianapolis and Bloomington, Indiana; Toledo, Ohio; and Broadford Junction, Pennsylvania. "The creosoting-in-transit arrangement seems to be quite common except in trunk-line territory." (61 I. C. C. 148.)

American Creosoting Company, engaged in shipping carloads of railroad ties, cross arms, and wood paving blocks from points of production in Southern Classification territory to points of consumption in Official Classification territory, was by the carriers denied creosoting-in-transit at Newark, New Jersey, where its plant is located. The rate from Meridian, Mississippi, and grouped points, to Boston, on basis of which creosoting-in-transit is permitted at central territory points, is 43 cents; by being denied the privilege, American Creosoting Company is obliged to pay from the same points of origin 53.5 cents to Boston, or 39 cents to Newark and 14.5 cents beyond. The joint rate from Meridian to New York is 39 cents; the combination on Newark is 47 cents or 39 cents to Newark and 8 cents beyond, with a disadvantage to American Creosoting Company, as

compared to its Central Freight Association competitors, of 8 cents. On shipments from Meridian to Portland, Maine, American Creosoting Company's Central Freight Association territory competitors have an advantage of 18.5 cents. (61 I. C. C. 149.)

Competition is keen in the sale of creosoted wood products and especially so in wood paving blocks (61 I. C. C. 148). American Creosoting Company sold its creosoted products on a margin of profit of about 5 per cent. It lost many contracts at points in New England and in the State of New York on which it bid, because of the difference in rates due to creosoting-in-transit, which enabled its competitors to underbid. American Creosoting Company has refrained from bidding in the territory lying between Newark and Central Freight Association territory because of this disadvantage.

Within the past few years the general demand for creosoted products has considerably increased and American Creosoting Company's commercial output has decreased. It has a plant of 1,800 cars per year of 30 tons each. In each of the years 1917 and 1918 it shipped only 700 or 750 cars. Its inability to operate its plant to capacity is attributed entirely to lack of transit arrangements (61 I. C. C. 149).

After a full hearing on complaint the Interstate Commerce Commission found that American Creosoting Company was subjected to undue prejudice under section 3, and directed that tariffs be published and filed applying rates, regulations, and practices to avoid it. The commission further found

that the refusal of the Central Railroad of New Jersey and the Pennsylvania Railroad Company to establish creosoting-in-transit at Newark was not unreasonable in and of itself, permitting the carriers to determine if they would install the privilege at Newark or withdraw from tariffs which permitted it elsewhere.

The two carriers named and twenty-one others operating in Central Freight Association territory filed their joint petition alleging that even if they are parties to tariffs naming joint through rates under which other carriers also parties thereto have established creosoting-in-transit at local points on the latter's lines, petitioners have not established the privilege on their own lines, and have not participated in, or been consulted in connection with, the establishment of the privilege at points on the other lines.

The only alleged injury is that the appellants may not comply with the order except by installing the privilege at Newark, which will deprive them of the difference between the sum of the local rates applying to and from Newark and the joint rates; the expense of policing the practice, etc. (61 I. C. C. 149.) There is no objection to an additional transit charge similar to that made to competitors of American Creosoting Company (61 I. C. C. 146).

In allowing the appeal from the order denying application for preliminary injunction the District Court also signed certain findings with respect to alleged irreparable injuries and allowed a stay sus-

pending the commission's order for thirty days, within which time appellants should *present to the Supreme Court* an application for further suspension; otherwise the suspension to expire. (Tr. 28, 29.)

ARGUMENT.

The Interstate Commerce Commission stated the question presented to it for decision—

> is primarily one of alleged undue prejudice resulting from the granting of a creosoting-in-transit arrangement to complainant's competitors, and the denial of a similar arrangement to complainant. (61 I. C. C. 150.)

The Commission answered that question by finding—

> The Central and the Pennsylvania, as well as other defendants herein, are parties to joint rates on creosoted lumber applying through Newark under which transit is permitted at competing plants on the through routes, but is denied to complainant at Newark, and thereby they become effective instruments of discrimination. (61 I. C. C. 151.)

Counsel say:

> What they [appellants] are contending is that a carrier cannot be charged with discrimination unless it participates in that which is claimed to cause the discrimination. (Br. 17.)

Section 3 of the act to regulate commerce, as amended by Transportation Act 1920, provides (24 Stat. 380; 41 Stat. 479):

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * *

All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

Section 15, as amended June 29, 1906, June 18, 1910, and by Transportation Act 1920, provides (34 Stat. 584; 36 Stat. 539; 41 Stat. 484):

That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in

extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this act for the transportation of persons or property or for the transmission of messages as defined in the first section of this act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than

> the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Milling-in-transit, substitution-of-tonnage-in transit, reshipping, and many kindred practices, have been subjects of consideration by the Interstate Commerce Commission almost continuously since its organization. The reshipping privilege was once condemned as wholly illegal, and the carriers operating at Nashville and in southeastern territory were ordered to abolish the practice *in toto* as questionable under the penal statutes (16 I. C. C. 590, 595). Subsequently, on rehearings, the commission decided that its former order abolishing the reshipping privilege was too strict and remitted the subject to the shippers and carriers to formulate regulations which would continue the privilege and eliminate rebates. (18 I. C. C. 280.) New and satisfactory regulations were adopted to safeguard the privilege. (21 I. C. C. 183, 188.)

In further proceedings the commission found that the installation of the privilege at Nashville and the withholding of it from Atlanta and other Georgia points was a discrimination under section 3 and ordered the carriers to desist. This court sustained the order which was written in the alternative. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, reversing Commerce Court, 191 Fed. Rep. 37; 197 Fed. Rep. 58.)

"In *The Five Per Cent Case* (31 I. C. C. 351, 408), we said that *transit is not part of the transportation service*, such as the expedited movement of freight, but '*something offered to the shipper in addition to the transportation service,*'" said the commission in *Southern Hardwood Traffic Assoc.* v. *Director General* (61 I. C. C. 139).

In transportation transit privileges, like the privilege to manufacture and sell alcoholic liquors, or to conduct a boxing exhibition (any of which may be prohibited entirely) are fraught with consequences of the most mischievous character unless carefully safeguarded.

In *Loomis* v. *Lehigh Valley R. R. Co.* (240 U. S. 43, 50), this court, speaking through Mr. Justice McReynolds, said:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered.
>
> In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. (*Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220.) And the preservation of uniformity and prevention of discrimi-

> nation render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. (See *Penna. R. R.* v. *Puritan Coal Co., supra*, pp. 128, 129; *Penna. R. R.* v. *Clark Coal Co., supra*, pp. 469, 470.)

What constitutes undue prejudice is a question of fact exclusively for the Commission to determine. (*Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57.) Similarly with respect to the suggestion that compliance with the order will tend to incite complaints of undue prejudice from other sources.

In *Interstate Commerce Commission* v. *C., R. I. & P. Ry. Co.* (218 U. S. 88, 108, 110):

> * * * the commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new * * *. And it may be that there can not be an accommodation of all interests in one proceeding * * *. The order of the commission besides is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by

> application to the commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the commission should first pass and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

In *Manufacturers Railway Co.* v. *United States* (246 U. S. 457) the commission, *in the same proceeding*, filed at different times three separate reports, and each reached a conclusion at variance with those of the others. The final report fixed the switching allowance of the trunk lines to the switching road at $2.50 per car, which was assailed by the switching road as confiscatory. The District Court dismissed the bills on final decrees, and in affirming, this court, *inter alia*, said: (482.)

> In the present case the negative finding of the commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. (28 I. C. C. 104, 105; 32 I. C. C. 102.) The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed, the first report of the commission was to the contrary; but to annul the commission's order on this ground would

be to substitute the judgment of a court for the judgment of the commission upon a matter purely administrative, and this can not be done. (*United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.)

Appellants concur with connecting lines in publishing tariffs of through routes and joint rates. Presumably they do that for the benefits and advantages they derive therefrom. In order to reap the rewards which flow from the interstate commerce acts with solidarity they stand united. They should be gauged in that way, and not disconnectedly, when injury results in applying those rates. To hold that single companies by specific acts may at favored places and in selected instances break that unification and solidarity, to the advantage of shippers at those favored places and to the *undue prejudice* of other shippers at unfavored places, is to annihilate the statute.

Appellants may not sustain the proposition that an undue prejudice created by the publishing of rates by joint action of the carriers may be justified by their separate action in the special application of those joint rates to particular circumstances.

Appellants assail the validity of section 3, *as construed by the Commission*, "as the Commission is attempting to force its establishment (creosoting-in-transit) by indirection, because (*a*) *connecting* lines have established it, and (*b*) because the appellants

are parties with these connecting lines to joint rates applying through Newark." (Br. 22.)

This argument assumes that undue prejudice may only result from the misuse of a single practice, i. e., different *rates* for shippers or localities similarly situated; milling-in-transit or creosoting-in-transit for one place and withholding it from another similarly situated; furnishing special equipment for one locality and withholding it from another similarly situated, etc. It further assumes that undue prejudice may not result from the joint action of carriers in publishing rates and the separate action of certain of those same carriers in allowing special privileges to certain favored localities in the use of those joint rates.

Moreover, as the commission drew the order in the alternative, it may fairly be assumed that the commission will accept compliance with the order in the manner in which it was drawn, i. e., by allowing either the withdrawal of the appellants from the through routes and joint rates or the installation of creosoting-in-transit at Newark.

Great Northern Railway Co. v. *Minnesota* (238 U. S. 340), relied on by counsel for appellants (Br. 19), rather sustains the order of the Commission in the instant case. The railway had installed 6-ton capacity stock scales at 54 of its 259 stock-shipping stations in Minnesota which were not used in transactions between carrier and shippers; the scales had no direct part in the transportation or selling at

terminal yards. Speaking for this court, Mr. Justice McReynolds said: (345, 346.)

> The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty. * * * Conceding power to inhibit discrimination the Commission could not exercise it unreasonably by needlessly taking property or, what comes to the same thing, obliging incurrence of expense wholly unnecessary. It by no means follows, simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The Commission's order precluded the use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. (*Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403, 417; *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 293; *Missouri Pacific Railway* v. *Nebraska*, 217 U. S. 196, 206.)

Counsel cite *Penn Refining Co.* v. *W. N. Y. & P. R. R. Co.* (208 U. S. 208) as holding that "even though the practice of one of the carriers under a joint rate is discriminatory, a connecting carrier, if it is

not a party to the practice, is not responsible, though it shares in revenue resulting therefrom." (Br. 18.)

That was a suit to recover overcharges growing out of alleged illegal practices of the railroad company in the transportation of oil during the period between May, 1894, and October, 1895. The whole theory of the discrimination rested upon the alleged failure to furnish tank cars to shippers demanding them, while at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively. The plaintiffs had made no demand for such cars for themselves and had no use for them. The Circuit Court left it "to the jury to find from them (the facts) whether there was 'undue discrimination' in favor of the shipper by tank cars and against the shipper by barrels." There was a verdict and judgment in the Circuit Court which the Court of Appeals reversed. The plaintiff lost the case on the merits. This Court affirmed the judgment of the Court of Appeals.

In the instant case the discrimination was not only found *by the Commission* but it is obvious to all. Counsel for appellants fail to take into account the enactment since the *Penn Refining case* arose in 1895 of the important amendments to the Act to Regulate Commerce in 1906 and in 1910, the Transportation Act, and the numerous opinions of this court construing the act as so amended and sustaining the enlarged powers of the Commission. (See *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 102; *Procter &*

Gamble Co. v. *United States*, 225 U. S. 282, 294, 295; *Intermountain Rate Cases*, 234 U. S. 476; *United States*, v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314.)

Counsel cite *Philadelphia & Reading Ry. Co.* v. *United States* (240 U. S. 334). In that case no undue discrimination against the shipper or the locality of its plant was found, the community declared to be prejudiced by the established conditions had not complained and was not a party to the proceeding, and the rate complained of was intrinsically reasonable; it was held that the mere fact that other carriers had adopted a lower schedule from the shipper's district to points other than the one designated afford no foundation for a finding by the Commission that such rate was unreasonable and erroneous as a matter of law.

Counsel fail in their endeavor to distinguish *St. Louis Southwestern Railway Co.* v. *United States* (245 U. S. 136), wherein this court said (144):

> Carriers insist also that the order is void on the ground, that since their "rails do not reach Paducah, they cannot be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from

> single carriers whose "rails" reach them. Clearly the power of Congress and of the commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. (*Cincinnati, New Orleans and Texas Pacific Railway Co.* v. *Interstate Commerce Commission, supra.*)

By a single order (Tr. 24) the District Court denied the application for preliminary injunction and overruled the motion filed by the United States to dismiss. (Tr. 20.)

That part of the order which denied the application for preliminary injunction should be affirmed.

That part of the order which overruled the motion of the United States to dismiss should be reversed with directions to sustain the motion and to dismiss the petition on final decree. (See *Los Angeles Switching Case*, 234 U. S. 294, 316; *Int. Com. Com.* v. *Baltimore & Ohio*, 225 U. S. 326, 346.)

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant Solicitor General.

NOVEMBER, 1921.

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No. 436 in Equity.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

WALTER MCFARLAND,
For Interstate Commerce Commission.
P. J. FARRELL,
Of Counsel.

OCTOBER, 1921.

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SUBJECT INDEX.

TABLE OF CASES CITED.

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v.
UNITED STATES OF AMERICA AND Interstate Commerce Commission.

No. 436, IN EQUITY.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

The American Creosoting Co. filed a complaint with the Interstate Commerce Commission, hereinafter called the Commission, which was docketed as No. 10582. The issues are described as follows at page 145 of the Commission's report in that proceeding (*American Creosoting Co.* v. *Director General*, 61 I. C. C. 145):

> Complainant is a corporation engaged in shipping carloads of lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to its plant at Newark, N. J., where they are creosoted and reshipped to points of consumption in official classification territory. For the movement of this material complainant pays the rates to and from Newark, whereas

its competitors in central territory and in the South have transit arrangements under which they can ship to the same points of consumption at the joint rates plus a transit charge. By its complaint filed March 24, 1919, as amended, complainant alleged that the denial to it of similar transit arrangements, which include the cutting of paving blocks into shape at the creosoting plant, resulted in charges which were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2, and 3 of the act to regulate commerce and of section 10 of the Federal control act. It is contended that just and reasonable carload rates would be the joint rates from the points of origin to the final destinations of the creosoted articles where the joint rates apply via Newark, and that where the joint rates do not apply through Newark the said joint rates plus charges ranging from 2.5 cents for 30 miles and under to 30 cents for 500 miles for out-of-line or backhaul movements would be just and reasonable. No objection is made to an additional transit charge similar to that charged its competitors. We are asked to prescribe just and reasonable rates for the future. Rates are stated herein in cents per 100 pounds and do not include the increases authorized in *Increased Rates, 1920* (58 I. C. C. 220).

The case was duly heard and submitted by the parties, and on March 15, 1921, the Commission made its report, referred to above, together with an order making said report a part of the order. For a complete statement of the Commission's findings, the

court is respectfully referred to the Commission's report. In that report it was said, among other things:

> Complainant located its plant at Newark in 1910. Its principal competitors, most of whom constructed their plants since that time, are located in central territory, at Madison, Ill., Indianapolis, and Bloomington, Ind., and Toledo, Ohio. There are other competitors at Broadford Junction, Pa., and Simpson, Miss. All of these operate under transit rules which give them the benefit of the joint rates where they apply through the creosoting point, and some of them under rules which also authorize the application of the joint rates, plus out-of-line or back-haul charges, the same or substantially the same in amount as those sought by complainant, where the joint rate is not applicable through the creosoting point.
>
> * * * * *
>
> Competition is keen in the sale of creosoted wood products and especially so in the sale of wood paving blocks. Complainant sells its creosoted products on a margin of profit of about 5 per cent. It has lost many contracts on which it has bid at points in New England and in New York State, which its witness stated was because competitors having the transit arrangement were enabled to underbid it, due to the difference in freight rates. * * * The following rates, among others cited by complainant, illustrate the disadvantage to complainant by reason of the adjustment assailed. The rate from Meridian, Miss., and grouped points to Boston, Mass., on basis of which creosoting in transit is per-

mitted at the central territory points, is 43 cents, whereas complainant pays a rate of 53.5 cents from the same points to Boston, 39 cents to Newark, and 14.5 cents beyond. The joint rate from Meridian to New York is 39 cents, while the combination on Newark is 47 cents, 39 cents to Newark, and 8 cents beyond, resulting in a disadvantage to complainant, as compared with its central territory competitors of 8 cents. On shipments from Meridian to Portland, Me., complainant's central territory competitors have an advantage of 18.5 cents.

* * * * *

It is apparent that the question here presented is primarily one of alleged undue prejudice resulting from the granting of a creosoting-in-transit arrangement to complainant's competitors and the denial of a similar arrangement to complainant. The record establishes that on much traffic to points beyond Newark in eastern New York and in New England, which territory complainant asserts constitutes its natural market, it is unable, as to all-rail traffic at least, to meet the competition of creosoting plants in central territory by reason of the situation complained of. Complainant contends that so long as the Pennsylvania and the Central participate in joint rates under which the transit arrangement is allowed by the other lines they are necessarily chargeable with unjust discrimination and undue prejudice because they do not allow the arrangement at Newark on their own lines. On behalf of the Central and the

Pennsylvania it is urged that they are not in anywise interested in or chargeable with the allowance of these transit arrangements by connecting lines. Those two carriers rely strongly upon *Grain & Hay Exchange* v. *P. Co.* (32 I. C. C. 409), *Indianapolis Chamber of Commerce* v. *C., C., C. & St. L. Ry.* (34 I. C. C. 267), *Meridian Grain & Elevator Co.* v. *A. & V. Ry. Co.* (38 I. C. C. 478), and other cases involving somewhat similar situations in which complaints alleging undue prejudice were dismissed. Those cases, however, were considered in *Southern Hardwood Traffic Asso.* v. *Director General* (61 I. C. C. 132), decided this date, and found to be no longer controlling in view of the enlarged powers conferred upon us by the transportation act, 1920. In the case last cited we found that defendants' participation in tariffs carrying joint rates on lumber and forest products applying through Memphis, Tenn., or Louisville, Ky., and permitting in connection with such joint rates transit at certain points on the through routes, while contemporaneously denying similar transit at Louisville or Memphis, subjected the complainants therein to undue prejudice. The Central and the Pennsylvania, as well as other defendants herein, are parties to joint rates on creosoted lumber applying through Newark under which transit is permitted at competing plants on the through routes, but is denied to complainant at Newark, and thereby they become effective instruments of discrimination.

* * * * *

> Following *Southern Hardwood Traffic Asso.* v. *Director General, supra*, and upon the facts of record in this case, we find that the refusal of the Central and the Pennsylvania to establish creosoting-in-transit arrangements at Newark is not unreasonable, but that defendants, in so far as they respectively participate in tariffs carrying joint rates on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks, applying through Newark from points in southern classification territory to points in northern New Jersey, eastern New York, and in New England, and permitting in connection with such joint rates creosoting in transit at Madison, Indianapolis, Bloomington, Toledo, or Simpson, while contemporaneously denying similar transit arrangements at Newark, subject complainant to undue prejudice and disadvantage.

The order of March 15, 1921, was directed not only against the Central Railroad Co. of New Jersey and the Pennsylvania Railroad Co., which have taken the principal part in resisting the order, but also against more than 20 other common carriers. It provided, in part:

> *And it appearing*, That the Commission has found in said report that the above-named defendants, in so far as they respectively participate in tariffs carrying joint rates applying through Newark, N. J., on lumber, piling, telegraph cross arms, railroad ties, and wooden paving blocks from points in southern classification territory to points in northern New Jersey, eastern New York, and in New Eng-

land, and permitting in connection with such joint rates creosoting in transit at Madison, Ill., Indianapolis, Ind., Bloomington, Ind., Toledo, Ohio, or Simpson, Miss., while contemporaneously denying similar transit arrangements at Newark, N. J., on the same through routes, subject complainant to undue prejudice:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1921, and thereafter to abstain, from the undue prejudice found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 20, 1921, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply rates, regulations, and practices which will avoid the undue prejudice found in said report to exist.

On June 27, 1921, a petition was filed in the United States District Court for the District of New Jersey by most of the defendants named in the Commission's order of March 15, 1921, seeking to have that order enjoined. The Commission filed its answer, and the United States a motion to dismiss the petition, and on July 2, 1921, a hearing was held on motion for an injunction and on motion to dismiss.

Thereupon the district court made an order to the following effect:

> 1. That the application for preliminary injunction made by the petitioners be, and the same is hereby, denied (to which ruling and order the petitioners except).
>
> 2. That the motion of the United States to dismiss the petition be, and the same is hereby, denied (to which ruling and order the United States excepts).

Petitioners then filed an assignment of errors and a petition for appeal to the Supreme Court of the United States. In connection with the petition for appeal they prayed—

> that upon such terms as to bond as this court may direct, an order issue staying and suspending the enforcement of said order of the Interstate Commerce Commission and restraining and enjoining the respondents or any or either of them from enforcing or attempting to enforce said order until your petitioners will have time to perfect their appeal and present to the Supreme Court of the United States an application for a preliminary suspension order pending the hearing of this appeal.

The district court allowed the appeal and entered an order reading in part as follows:

> It is further ordered that if the petitioners shall within thirty days from the date hereof perfect their appeal to the Supreme Court and also present to that court within such thirty days a petition for a preliminary suspension of the order of the Interstate Com-

> merce Commission, referred to in the petition for appeal, pending the determination of such appeal, * * * the said respondents be, and they hereby, are restrained and enjoined from enforcing or attempting to enforce the order of the Interstate Commerce Commission dated March 15, 1921, in American Creosoting Co. against Director General et al., I. C. C. Docket No. 10582, until such time as the Supreme Court of the United States shall determine said petition for a preliminary suspension of said order.

The assignments of error are very general in character and may be summarized as being a contention that the district court erred in not holding that the order of the Commission was invalid and in not enjoining its enforcement.

Subsequently the appellants filed their "Petition and motion by the appellants for the preliminary suspension pending appeal of the order of the Interstate Commerce Commission involved herein and argument on said motion."

The case is now pending decision upon appeal from the order of the district court denying a preliminary injunction and upon the above-mentioned "Petition and motion."

ARGUMENT.

1. The petition and motion for the preliminary suspension of the Commission's order of March 15, 1921, should be denied.

This point is covered in the brief filed by the United States and little need be added. The Commission calls attention to the fact that there is grave doubt, to say the least, whether a district court, after denying an injunction, can rely upon its general equity jurisdiction and issue an order restraining the enforcement of an order of the Commission, pending appeal to the Supreme Court of the United States, in view of the fact that the statutes applicable to such cases, 36 Stat., 539, and 38 Stat., 219, provide a specific procedure to be followed where it is sought to enjoin orders of the Commission.

In this case, as in others, the argument is made that great and irreparable injury will be done to the railroad corporations if they are required to obey the Commission's order, whereas no one can be injured if the enforcement of the order is stayed pending an appeal, upon the execution of a bond. This reasoning, which might hold good in private litigation between two individuals, is fallacious as applied to a suit to enjoin the Commission's order. In the latter case not only the litigants but the entire public are interested. The duty of the Commission to prevent and remove violations of the interstate commerce act is a continuing one, applying not only to this case but to all other cases which may be brought before it. Obviously, it is a source of

great embarrassment, in deciding other similar cases, to have the operation of one of its orders stayed pending appeal, even though the validity of that order has been upheld by the refusal to enjoin its enforcement. The rights of the carriers are sufficiently protected by the statute authorizing them to apply to the district court for an injunction; and if they are unable to show that an injunction should be issued, the Commission should not be hampered in its administration of the interstate commerce act and kindred acts by an order staying the operation of its order.

2. The appellants admit that the Commission's findings of fact are correct.

While there are vague intimations in the assignments of error that the Commission's findings were unsupported by facts disclosing a violation of the interstate commerce act, the appellants, in their "Petition and motion" referred to above, state that "The question presented is strictly one of law" and that "The carriers are not seeking court review of any administrative finding of the Interstate Commerce Commission." As set forth on page 5 of the "Petition and motion," the appellants conceive that—

> In this appeal, however, no question of fact is involved. The question is not whether any preference is undue but solely whether, as a matter of law, the Commission is right in holding that a violation of section 3 of the interstate commerce act, as amended, is disclosed because one carrier whose local practices are

> found reasonable does not change these local practices so as to conform to the local practices of another carrier with which it is a party to joint rates on the commodity in question.

The purpose of this is, apparently, to escape the force of the decisions of the Supreme Court making the findings of the Commission conclusive where supported by evidence. (*Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S., 452, 470; *Int. Comm. Comm.* v. *Union Pacific R. R.* 222 U. S. 541, 547; *Atchison Railway Co.* v. *United States*, 232 U. S. 199, 220; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320; and *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 488.) The following excerpt from *Procter & Gamble* v. *United States* (225 U. S. 282, 297) is typical:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so.

There is no question but what the American Creosoting Co. is injured by the denial of the transit arrangement at Newark while such transit arrangement is granted to competitors at other points on the through route over which the joint rate applies. On page 149 of the Commission's report, *supra*, it is pointed out that the creosoting company's disadvantage ranged from 8 cents to 18.5 cents per 100 pounds on shipments to typical points under the rates in effect prior to the publication of the increased rates authorized in *Increased Rates, 1920* (58 I. C. C. 220). Under the percentage increases there authorized the disparity is even more marked.

The products of the creosoting company are of relatively low value, are sold "on a margin of profit of about 5 per cent," and it is obvious that the disadvantage in freight rates is a serious and perhaps an insurmountable handicap.

3. What amounts to undue preference or prejudice is a question not of law, but of fact, with which the Commission was created to deal.

The principal purpose in enacting the interstate commerce act was to prevent and remove unjust discrimination and preference. See pages 182 and 215 of the report made in 1886 by a Senate committee, of which Senator Cullom was chairman, generally known as the Cullom report.

In *United States* v. *Louis. & Nash. R. R.* (235 U. S. 314, 320), the Supreme Court said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*

(215 U. S. 452), *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.* (220 U. S. 235), *Interstate Com. Com.* v. *Louisville & Nashville R. R.* (227 U. S. 88), it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. (*East Tenn. &c. Ry. Co.* v. *Interstate Comm. Comm.*, 181 U. S. 1, 23–29). And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

See also *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.* (204 U. S. 426, 439) and *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.* (218 U. S. 88, 102, 103, 110).

In *Manufacturers Ry. Co.* v. *United States* (246 U. S. 457, 481) the court said:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

To the same effect, see *Pennsylvania Co.* v. *United States* (236 U. S. 351, 361) and *Int. Comm. Comm.* v. *Del., L. & W. R. R.* (220 U. S. 235, 255).

The position of the carriers is simply that, despite what the Commission may find to be the fact, it can not make a valid order to remove the undue prejudice for the reason that the transit services at points in central and southern territories are published in local tariffs of carriers reaching those points, to which tariffs Central Railroad Co. of New Jersey and the Pennsylvania are not parties.

In the district court the carriers relied upon certain decisions of the Commission which, they claimed,

were not consonant with the report in No. 10582, but we do not feel justified in consuming the court's time by summarizing, analyzing, and discussing these decisions in view of the fact that they have no bearing, as we see it, upon the question before the court, namely, Did the Commission exceed its authority in making the order in the *American Creosoting Co. case?*

Appellants also relied upon the opinion in *Penn Refining Co.* v. *West. N. Y. & P. R. R. Co.* (208 U. S. 208, 222), but an examination shows that there is no similarity between the facts in that case and those in the case at bar. Moreover, at the time the Commission made its decisions involved in the *Penn Refining Co. case* its findings of fact upon administrative questions, as such, were not conclusive.

4. The Commission's order can be obeyed by appellants.

Appellants said in their brief in the lower court, and the caption of the case also discloses, that —

> The petitioners [appellants here] include practically all the important railroad companies operating in what is known as Trunk Line and New England territory, which, roughly speaking, includes all that section of the United States east of a line drawn through Buffalo and Pittsburgh and north of the Potomac River.

The Commission found that undue prejudice existed and required all the defendants, not merely the Central Railroad and the Pennsylvania, according as

they participate in the transportation, to cease and desist from and to avoid such undue prejudice. It gave no direction as to the specific manner in which this should be done.

Appellants can comply with the order by pursuing any one of the following courses: (*a*) Establish the transit service at Newark; (*b*) cancel their participation in the joint rates through Newark; or (*c*) qualify their concurrence in such rates to joint rates through Newark in connection with which transit is not accorded at any point on the through route.

Many reasons have been advanced by appellants why they do not wish to obey the order. None has been given which shows that they can not obey. As stated above, they are the principal carriers in trunk line and New England rate territories, and without their cooperation it would be impossible to subject the American Creosoting Company at Newark to undue prejudice.

5. The order of the Commission is valid and should be sustained.

In this case it will be seen that wooden paving blocks, for example, move from points in the South through Newark to destinations in northern New Jersey, eastern New York, and in New England. The carriers conducting the transportation, including appellants, have joined in the establishment of joint through rates. If a shipment of paving blocks is treated at Madison, Ill., Indianapolis, Ind., or one of the other points named in the Commission's report and order at which the American Creosoting

Co.'s competitors are located, the joint rate is paid, plus the transit charge, if any, for the additional service at the transit point. If, on the other hand, the paving blocks are treated at Newark, the joint rate does not apply, there being no transit service authorized at that point, and the American Creosoting Co. is compelled to pay the much higher combination of the rates up to and beyond Newark.

There is no question as to the injury sustained by that company. The Commission has found that undue prejudice exists and has directed its removal.

Appellants resist the order on the ground that they are not parties to the local tariffs according transit in connection with the joint through rate at other points on the through route. They allege that to establish transit at Newark would result in depriving them of their property and also that it would be contrary to their policy regarding the establishment of transit.

With regard to the allegations concerning deprivation of property, a complete answer is that nothing in the Commission's order prevents the appellants from making a reasonable charge for the transit service if they elect to obey the order by establishing transit at Newark. The court's attention is also invited to the fact that under section 15a of the interstate commerce act the Commission is required to initiate rates which will yield to carriers in rate groups established by the Commission a fair return upon the aggregate value of their railroad property in the respective groups devoted to the public service.

In *Increased Rates, 1920, supra,* the appellants, among other carriers, were accorded greatly increased rates.

The fact that a carrier has a certain policy can have no bearing upon its duty to obey the statute and lawful orders made pursuant thereto. Otherwise the rights of the public would depend upon the whims of the carriers and conditions would be intolerable, particularly where, as here, different carriers have conflicting policies.

The appellants have, collectively, made possible the undue prejudice against the American Creosoting Co. Collectively they can, beyond question, remove such undue prejudice. That is, if the transit service is established at Newark, both the American Creosoting Co. and its now favored competitors can ship on the basis of the joint through rates, plus transit charges, if any; while if the joint rates through Newark are cancelled or concurrence in such rates is limited to joint rates in connection with which no transit is permitted all parties must pay the higher combination rates.

The question before the court is, Does the fact that appellants do not participate in the local transit tariffs, according to the transit service in connection with the joint through rates, render invalid an otherwise valid order of the Commission and make it impossible to remove undue prejudice resulting from the concerted action of a number of carriers, although such undue prejudice could be removed if only one carrier were involved?

While it is true that appellants do not publish the transit services accorded to the American Creosoting Co.'s favored competitors, it is equally true that their partners in the joint through rates do publish them and that by continuing to participate in the joint through rates appellants have made possible, and have made themselves effective instrumentalities in the execution of, the undue prejudice condemned by the Commission.

In speaking of section 3 of the interstate commerce act the Supreme Court said, in *Houston & Texas Ry.* v. *United States* (234 U. S. 342, 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.

And in *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry., supra*, the court said (pp. 102, 103):

> The Commission was instituted to prevent discrimination between persons and places. * * * The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the

> wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." (*Interstate Commerce Commission* v. *Illinois Central Railway Company*, 215 U. S. 452, 478.)

While not identical as to the facts, the Commission believes that the case of *St. Louis S. W. Ry. Co.* v. *United States* (245 U. S. 136), is controlling in principle. In that case it appeared that there were through routes and through rates on logs and lumber to Paducah, Ky., from the southwest. To Paducah the rate was 22 cents per 100 pounds, which was 6 cents more than the rate to Cairo, Ill. The Commission concluded that the carriers should establish and maintain through routes to Paducah via either Memphis, Tenn., or Cairo, and joint rates "not in excess of the rates at present in effect * * * to Cairo."

In the course of its opinion the court said, page 144:

> Carriers insist also that the order is void on the ground that, since their "rails do not reach Paducah, they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois

> Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it.

The Commission's report and order were not made arbitrarily, but with evidence to support them, and the Commission did not exceed the authority conferred upon it. It is respectfully submitted that the order of the district court denying the preliminary injunction should be affirmed.

WALTER MCFARLAND,
Counsel for the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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the process of creosoting and forwarded on the original bill of lading to the destination therein named, without depriving the shipper of the benefit of through rates. P. 257.

3. What Congress sought to prevent by § 3 of the Act to Regulate Commerce was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. P. 259.
4. Participation in joint rates does not make connecting carriers partners, and they can be held jointly and severally responsible for unjust discrimination only if each has participated in some way in that which causes it. P. 259.
5. Neither the Transportation Act of 1920, nor any earlier amendatory legislation, has changed, in this respect, the purpose or scope of § 3. P. 260.
6. Where the Commission found that denial of the creosoting privilege to a plant located at a point on the lines of certain carriers was not in itself unjust or unreasonable, but concluded that the plant suffered undue prejudice and disadvantage because they and other carriers before the Commission maintained joint rates, over routes passing through the point, in common with still other carriers, not parties, who had allowed the privilege to plants on their own lines as an item in their local tariffs and without the concurrence of the carriers before the Commission or participation by them in the revenues from the privilege, *held*, that the case was not remediable under § 3 of the Act to Regulate Commerce and that an order requiring the carriers proceeded against to remove the discrimination should be set aside. P. 257.

Reversed.

APPEAL from a decree of the District Court denying a preliminary injunction in a suit brought by the Central Railroad Company of New Jersey, the Pennsylvania Railroad Company, and twenty-one other railroad corporations, to set aside an order made by the Interstate Commerce Commission.

Mr. Henry Wolf Bikle and *Mr. Alexander H. Elder*, with whom *Mr. Charles E. Miller* was on the brief, for appellants.

A carrier is not chargeable with a violation of § 3 of the Interstate Commerce Act unless it participates in the

service which is claimed to cause the undue prejudice prohibited.

In other words, there is no infraction of the section unless a carrier, serving two shippers, treats them differently in respect to the service which it renders, without just cause.

The applicable portion of § 3 is the first paragraph (24 Stat. 380). Paragraph 3 very clearly does not apply to the present litigation. It will also be found that neither paragraph 2, nor paragraph 4, of § 3, has any application.

Section 15 is one of the jurisdictional sections of the act. It does not expand the duties and obligations which are devolved upon the carriers by the other sections, principally § § 1, 2, 3 and 4, but it establishes the power of the Commission to enforce these duties and obligations. As illustrated by the Tank Car Case, *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, carrier duties and commission power are not necessarily correlative.

Section 3 forbids any common carrier making or giving any undue or unreasonable preference or advantage to any particular person, or subjecting any particular person, etc., to undue or unreasonable prejudice or disadvantage. The prohibition against undue prejudice and disadvantage is the correlative of the prohibition against undue preference and advantage. The very word "preference" carries with it the thought of different treatment of two patrons by the same carrier. So also with respect to the words "advantage" or "disadvantage" and "prejudice," no carrier can create any advantage or disadvantage, or undue prejudice, unless, by its act, it places the one shipper in a more or less favorable position than it places the other. If this were not true the disadvantage, prejudice, etc., would arise not from its act, but from extraneous circumstances, with the result, illustrated in the case at bar, that a carrier would be required to accord a privilege,

found upon hearing not reasonably demandable as to that carrier, merely because some other carrier granted the privilege under circumstances not in proof.

The decisions hold that, if a given commodity may be shipped to a common destination from different points of origin via the lines of two different carriers, there is no violation of § 3 even though the rates may be on an entirely different basis, relatively, and even though the effect of such different bases of rates is practically to exclude the shippers located at one point of origin from the common market. *East Tennessee, &c. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18. The Interstate Commerce Commission, in many cases, has followed this construction of the act.

It is manifest that in the present case the Commission has made a new departure which it seeks to justify upon the provisions of the Transportation Act, 1920. But no change was effected by this act in the applicable portion of § 3 of the Interstate Commerce Act. The Commission makes the general statement that the Transportation Act has greatly enlarged its powers "and among other things we have been given authority to establish minimum rates." What connection exists between the minimum rates and § 3 is not disclosed.

The Interstate Commerce Act prescribes that a carrier party to a joint tariff must be shown as a participating carrier, (§ 6, par. 4, 34 Stat. 584). Clearly the law contemplates that a carrier shall not be regarded as participating in tariffs except when it is a party thereto.

While, when a joint through rate is established, it is ordinarily less than the sum of the combination of rates on some intermediate point, this is not a necessary feature of a joint rate, and, in fact, thousands of joint rates are the equivalent of the combination of so-called locals based on some intermediate point. In such a case, the handicap resulting to a shipper who does not have the

transit privilege, while it is accorded his competitor on another railroad participating in the transportation of the shipments, has no relation to the existence or non-existence of a joint rate. The disadvantage results from the establishment of the local privilege on the connecting line and the control of and responsibility for this rest alone with the railroad establishing it. The law requires the carriers to move the traffic, and no undue prejudice or discrimination can arise as a result of the service so rendered.

The Government and the Commission rely on the decision in *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314. But, in that case this court did not sustain the Commission's finding under § 3 of the Interstate Commerce Act, but did uphold it under § 4. In this case there is no pretense that § 4 is involved, or violated.

The case at bar is different also from the other case in this court, relied on by the Government and the Commission,—*St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136. The conclusive decision seems to be *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221.

An order of the Commission based solely upon a violation of § 3 must be in the alternative, leaving the carrier free either to extend the practice or privilege to the complaining patron or to withdraw it from all. The order in this case, although in form an alternative order, leaves no real alternative in fact and actual operation.

If § 3 were construed as the Commission has construed it in this case, it would be unconstitutional as violative of the due process clause of the Fifth Amendment.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Appellants concur with connecting lines in publishing tariffs of through routes and joint rates. Presumably they

do that for the benefits and advantages they derive therefrom. In order to reap the rewards which flow from the Interstate Commerce Acts with solidarity they stand united. They should be gauged in that way, and not disconnectedly, when injury results in applying those rates. To hold that single companies by specific acts may at favored places and in selected instances break that unification and solidarity, to the advantage of shippers at those favored places and to the undue prejudice of other shippers at unfavored places, is to annihilate the statute.

As the Commission drew the order in the alternative, it may be assumed that it will accept compliance by allowing either the withdrawal of the appellants from the through routes and joint rates or the installation of creosoting-in-transit at Newark. *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340. Distinguishing *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208; and *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334. Counsel fail in their endeavor to distinguish *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136.

Mr. Walter McFarland, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

What amounts to undue preference or prejudice is a question not of law, but of fact, with which the Commission was created to deal. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235, 255.

Appellants can comply with the order by pursuing any one of the following courses: (*a*) Establish the transit service at Newark; (*b*) cancel their participation in the joint rates through Newark; or (*c*) qualify their concur-

rence in such rates to joint rates through Newark in connection with which transit service is not accorded at any point on the through route.

They are the principal carriers in trunk line and New England rate territories, and without their coöperation it would be impossible to subject the American Creosoting Company at Newark to undue prejudice.

The fact that a carrier has a certain policy can have no bearing upon its duty to obey the statute and lawful orders.

While it is true that appellants do not publish the transit services accorded to the favored competitors, it is equally true that their partners in the joint through rates do publish them and that by continuing to participate in the joint through rates appellants have made possible, and have made themselves effective instrumentalities in the execution of, the undue prejudice condemned by the Commission. *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342, 356; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 102, 103. *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, is controlling in principle.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the Federal District Court for New Jersey to enjoin the enforcement of an order of the Interstate Commerce Commission on the ground that it exceeds the powers of the Commission, was arbitrary and is void. The plaintiffs were the Central Railroad of New Jersey, the Pennsylvania, and twenty-one other railroads located in Trunk Line territory and New England. The defendants were the United States and the Interstate Commerce Commission. The former filed a motion to dismiss; the latter an answer which admitted the material allegations of the bill of complaint. On these pleadings

the case was heard before three judges on an application for a preliminary injunction. This was denied without written opinion; and the case is here on appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The order of the Commission was entered upon a petition of the American Creosoting Company to which these twenty-three carriers—and no others [1]—were made respondents. *American Creosoting Co.* v. *Director General*, 61 I. C. C. 145. It alleged that the petitioner had a creosoting plant at Newark, New Jersey, which was connected by switch tracks with the Central and the Pennsylvania; that these carriers had failed to establish there the privilege known as creosoting-in-transit; that this failure was unjust and unreasonable in violation of § 1 of the Act to Regulate Commerce of February 4, 1887, as amended; and that it was also unjustly discriminatory in violation of § 3. The Commission found that failure to establish this transit privilege was not unjust or unreasonable and denied relief under § 1. But it found on the facts hereinafter stated that this failure subjected the company to unjust discrimination; and, granting relief under § 3, the Commission directed that the discrimination be removed by the respondents, who are the appellants here.

By the privilege called creosoting-in-transit, forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named. Where the privilege is granted and availed of, delivery is made of the commodity to the creosoting plant, as if that were the final destination. It is there unloaded and treated;

[1] Except the New York, Ontario and Western Railway Company, another carrier in the Trunk Line territory, whose interests were presumably not affected by the order. The number of carriers is, therefore, referred to herein as being twenty-three.

and at some time thereafter it is redelivered to the carrier, as if there were an initial shipment of the creosoted product. Then it is forwarded to the final destination. Although some charge is made for the transit service, the shipper secures thereby a lower freight rate. For through rates are generally much less than the rate on the untreated forest product from point of origin to the transit point plus that on the treated product from there to destination.

The plant of the American Creosoting Company is not reached by lines of any of the twenty-three appellants except the Central and the Pennsylvania. Neither of these two carriers accords the creosoting-in-transit privilege at any point on its lines; and no competitor of the company has a plant on those of either. Nor is the privilege granted in Trunk Line territory by any carrier, with a single exception not here material. Some competitors of the American Creosoting Company have plants in Mississippi, Indiana, Illinois, Ohio and Pennsylvania; and the several railroads on which these plants are located have, each acting independently, established the privilege at the places where those plants are situated. Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting-in-transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers. And the whole revenue received for use of the privilege is retained by the local carrier. The appellants did not participate in any way in establishing the transit privileges enjoyed by

competitors of the Newark concern on lines of the southern and midwestern carriers; and none of those carriers is controlled by any of the appellants. But appellants did join with those southern and midwest railroads in establishing joint rates on forest products over routes which pass through the points at which this privilege prevails and also through Newark.[1]

The order entered by the Commission declares that the twenty-three carriers "in so far as they respectively participate in tariffs carrying joint rates" on these forest products "through Newark . . . from points in southern classification territory to points in northern New Jersey, eastern New York, and in New England" subject the American Creosoting Company to undue prejudice and disadvantage; and it directs these twenty-three carriers to avoid this undue prejudice. How the discrimination shall be removed is not prescribed. In effect the order directs that unless the Central and the Pennsylvania establish the privilege at Newark, the twenty-three carriers must withdraw from all tariffs establishing the joint rates. As to administrative orders operating *in futuro*, the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and a finding that the discrimination is unjust is ordinarily a finding of fact. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 482. But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding made by the Commission can pre-

[1] The transit privilege so granted includes cutting of paving blocks into shape at creosoting plant. On some of the railroads the joint rates do not apply through the transit point. On them the privilege includes an out-of-line movement and on some lines also a back haul to reach final destination. This broadened privilege was sought for Newark.

vent the review of such questions. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334.

Creosoting-in-transit, like other transit privileges, rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. The practice has its origin partly in local needs, partly in the competition of carriers for business. The practice is sometimes beneficial in its results; but it is open to grave abuses.[1] To police it adequately is difficult and expensive. Unless adequately policed, it is an avenue to illegal rebates and seriously depletes the carriers' revenues. Railroad managers differ widely as to the policy of granting such privileges. The Commission clearly has power under § 1 of the Act to Regulate Commerce as amended to determine whether in a particular case a transit privilege should be granted or should be withdrawn. For that section requires, among other things, that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations. The Commission might, therefore, acting under § 1, have directed the Central and the Pennsylvania to establish the creosoting-in-transit practice at Newark, if it deemed failure to do so unreasonable or unjust; or it might, in an appropriate proceeding, have directed the southern and midwestern carriers to discontinue the practice on their lines, if it deemed the granting of the privilege to be unreasonable or unjust. But it did neither. Instead it sought to accomplish by indirection either one result or the other and ordered under § 3 that the discrimination found to exist be removed. Twenty-one of the appellants are powerless either to cause the Central

[1] See *In Matter of Alleged Unlawful Rates and Practices*, 7 I. C. C. 2[illegible]; *In Matter of Substitution of Tonnage at Transit Points*, 18 I. C. C. 280; *The Transit Case*, 24 I. C. C. 340.

CENTRAL RAILROAD COMPANY OF NEW JERSEY ET AL. v. UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 436. Argued November 17, 1921.—Decided December 5, 1921.

1. Orders of the Interstate Commerce Commission may be set aside when based upon mistake of law. P. 256.
2. The Commission has power under § 1 of the Act to Regulate Commerce, as amended, to determine in particular cases whether the granting or withholding of a transit privilege is unreasonable and unjust, and to require its allowance or its withdrawal accordingly. So *held* of the privilege of "creosoting-in-transit," whereby forest products may be unloaded at an intermediate point, subjected to

and the Pennsylvania to instal the privilege at Newark or to cause the southern and midwestern carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise powerless to cause these connecting carriers to withdraw the privilege. They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so would involve departure from a policy to which they have steadfastly adhered and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment and would adopt a practice which some connecting carriers had introduced without their concurrence or consent, and which may hereafter, upon appropriate enquiry, be held by the Commission to be unjust and unreasonable. Congress could not have intended that under such circumstances relief should be afforded under § 3, when a direct remedy is available under § 1.

It is insisted that the order leaves appellants the alternative of withdrawing from the tariffs which establish joint rates with the southern and midwestern carriers through Newark. The order does not so provide in terms; and in fact the alleged alternative is illusory. The undue prejudice found arises not from the existence of joint rates, but from conditions local to other railroads. Cancellation of the joint rates would not change those conditions. Although the joint rates were withdrawn, the established through routes would remain. The duty to provide such routes is specifically enjoined by paragraph 4 of § 1; and, under the provisions of paragraph 1 of § 6, the separately established rates of the several connecting carriers would, in the absence of joint rates, apply to through transportation. So far as appears the Newark concern would be under the same disadvantage as compared with its competitors, whether the traffic moved on the combination of the rates local to the several lines or

on joint rates. Even the abolition of the through routes (which is not suggested) would leave the relative positions of the several creosoting concerns unchanged. Cancellation of the joint rates would, at most, relieve appellants from the charge that they are violating the provisions of § 3.

It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under § 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 144. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.,* 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1, 18. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of § 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the

same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3.

Reversed.